Perbadanan Pengurusan Palm Spring @ Damansara v Ideal Advantage Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO WA-22NCVC-756–11 OF 2016
NANTHA BALAN J
22 DECEMBER 2017

Land Law — Strata title — Management corporation — Claim over car parks in condominium project — Developer's obligation under development order — Development order provided that developer must provide 218 visitor car park — Legality of units of condominium sold to single purchaser — Whether management corporation could challenge compliance of development order — Whether management corporation had locus standi to commence legal action — Whether action barred by Limitation Act 1953 — Strata Titles Act 1985

The present case concerned a management corporation's ('the plaintiff') claim over car parks in a condominium project. The dispute was, inter alia, over the developer's obligation under the approved development order to provide 218 visitor's car parks and the legality of the developer's ('the second defendant') purported sale of 45 units of condominium to a single purchaser ('the first defendant'), alleged to be 'closely related' to the developer, together with 439 car parks as accessory parcels which were said to be attached or appurtenant to these units. The 439 car parks were all located at the perimeter car park within the condominium. Essentially, the management corporation sought to impugn the developer's purported sale of 439 car parks to a single purchaser and to claim ownership of the car parks as part of common property. In the present suit, the plaintiff claimed for: (a) a declaration that 40 sale and purchase agreements between the first and second defendants to the extent that the sale of the said 394 accessory parcels by the second defendant to the first defendant and any further transfers of the same (if any) were invalid and unenforceable; and (b) a declaration that the defendants were not entitled to any rental collection for the car parks including the 439 accessory parcels. The issues that arose were, inter alia: (i) whether the plaintiff could challenge the compliance of the development order by the local authority ('the DO') by the second defendant and the registration of the car parks in favour of the first defendant via a private legal suit and not through a public law action; (ii) whether the plaintiff had the locus standi under the provision of Strata Titles Act 1985, to commence legal action against the first defendant and/or the second defendant to claim for ownership rights over 394 accessory car parks registered under the 45 condominium units registered under the first defendant; (iii) whether the plaintiff's claim against the second defendant was barred by the Limitation Act 1953; (iv) whether the second defendant complied with the DO in providing

sufficient car parks in the condominium for residents and for visitors; and (v) and whether pursuant to the DO, the second defendant provided at least 218 visitors' car parks in the condominium.

Held, allowing the claim:

(1) The DO could not override contractual obligations and agreements reached between the parties, so long as the contract or the consideration for the contract or the object was not illegal. The endorsement on the DO that there should be one car park per unit meant that the developer had to ensure that in terms of numbers that there are at least one car park per dwelling unit. There were more than 218 car parks and the second defendant was also obliged per the DO to provide 10% of the minimum car parks or 218 car parks as 'visitor's car parks'.MPPJ would have satisfied themselves that the second defendant had provided the minimum car parks and the visitor's car parks, but in terms of the numbers only (see paras 108–109).

(2) It was more probable than not that the second defendant did not do any markings of visitor's car parks at any location and neither did the second defendant inform the JMB or the plaintiff of the location of the visitor's car parks at any time. The location of visitor's car parks was elusive. Since all non accessorised car parks have been 'encumbered' pursuant to letters issued by the second defendant to unit owners, it was quite inconceivable that was there any car park at all that was left which remained to be used as visitor's car parks (see para 115).

(3) The renting out of the 439 car parks by the first defendant was a 'dealing' of the accessory parcels which was independent of the main parcels and this was prohibited by ss 34(2) and 69 of the Strata Titles Act 1985. 'Dealing' in the National Land Code includes 'tenancy'. The word 'dealt with' in ss 34(2) and 69 of the Strata Title Act 1985, includes any dealings by way of tenancies or the rental of car parks. It was therefore illegal and the sale of 394 car parks by the second defendant to the first defendant fell within s 24(b) of the Contracts Act 1950 and must accordingly be struck down (see paras 121–122).

(4) It was not for MPPJ to dictate contractual terms via the DO. However, the second defendant did not comply with MPPJ's condition in the DO for there to be visitors parking. The visitor's car parks was to be located at the perimeter parking. The second defendant was required to mark out the visitor's car parks but there was no evidence that the second defendant marked out the visitor's car parks. There was no follow up by the JMB or MC with MPPJ about the failure by the second defendant to mark out the visitor's car park at the perimeter car park (see para 124).

(5) This was a private law matter which concerned the issue of illegality. There was no substance in the argument that the plaintiff should have commenced judicial review against the Pentadbir Tanah dan Galian Wilayah Persekutuan for registering 439 car parks as accessory parcel in the first defendant's name as the illegality here emanated from the evidence which disclosed the first defendant's intention and actual usage of the excessive car parks as a commercial venture ie dealing with the car parks in a manner which was independent of the main-parcels. There was also no basis for judicial review against MPPJ in respect of alleged non-compliance with the DO because in terms of the numbers, the first defendant did construct sufficient numbers of car parks but these were hijacked by the first defendant who gave away car parks to unit owners and sold excessive car parks to their associated or friendly party, the first defendant (see paras 130–131).

[Bahasa Malaysia summary

Kes ini adalah berkenaan tuntutan pengurusan koperasi ('plaintif') terhadap tempat letak kereta di dalam projek kondominium. Pertikaian tersebut, antara lain, adalah tentang kewajipan pemaju di bawah perintah pembangunan yang diluluskan untuk menyediakan 218 tempat letak kereta pelawat dan kesahihan pemaju ('defendan kedua') yang dikatakan menjual 45 unit kondominium kepada seorang pembeli ('defendan pertama'), yang dikatakan 'berkait rapat' dengan pemaju, bersama-sama dengan 439 tempat letak kerata sebagai bahagian aksesori yang dikatakan berkaitan atau berkenaan dengan unit-unit ini. 439 tempat letak kereta ini semuanya terletak di perimeter di dalam kondominium. Pada asasnya, perbadanan pengurusan mempertikaikan jualan 439 tempat letak kereta oleh pemaju kepada pembeli tunggal dan untuk menuntut milikan tempat letak kereta sebagai sebahagian daripada harta bersama. Dalam guaman ini, plaintif menuntut: (a) satu perisytiharan bahawa 40 perjanjian jual beli antara defendan pertama dan kedua setakat yang jualan 394 bahagian aksesori oleh defendan kedua kepada defendan pertama dan apa-apa pindahan lanjut yang sama (jika ada) adalah tidak sah dan tidak boleh dikuatkuasakan; dan (b) perisytiharan bahawa defendan tidak berhak mendapat apa-apa kutipan sewa bagi tempat letak kereta termasuk 439 bahagian aksesori. Isu-isu yang timbul adalah, antara lain: (i) sama ada plaintif boleh mencabar pematuhan perintah pembangunan oleh pihak berkuasa tempatan ('DO') oleh defendan kedua dan pendaftaran tempat letak kereta yang memihak kepada defendan pertama defendan melalui guaman undang-undang peribadi dan bukan melalui tindakan undang-undang awam; (ii) sama ada plaintif mempunyai locus standi di bawah peruntukan Akta Hakmilik Strata 1985, untuk memulakan tindakan undang-undang terhadap defendan pertama dan/atau defendan kedua untuk menuntut hak milikan lebih daripada 394 aksesori tempat letak kereta yang didaftarkan bawah 45 unit kondominium berdaftar di bawah defendan pertama; (iii) sama ada tuntutan plaintif terhadap defendan kedua terhalang oleh Akta Had Masa

A 1953; (iv) sama ada defendan kedua mematuhi DO dalam menyediakan tempat letak kereta yang mencukupi di kondominium untuk penduduk dan pelawat; dan (v) dan sama ada menurut DO, defendan kedua menyediakan sekurang-kurangnya 218 tempat letak kereta pelawat di kondominium itu.

B **Diputuskan**, membenarkan tuntutan:

(1) DO tidak dapat mengatasi kewajipan kontrak dan perjanjian yang dimeterai antara pihak-pihak, selagi kontrak atau pertimbangan untuk kontrak atau objeknya tidak menyalahi undang-undang. Endorsmen pada DO bahawa harus ada satu tempat letak kereta seunit bermakna pemaju harus memastikan bahawa, dari segi bilangan, terdapat sekurang-kurangnya satu tempat letak kereta seunit kediaman. Terdapat lebih daripada 218 tempat letak kereta dan defendan kedua juga diwajibkan di bawah DO untuk menyediakan 10% daripada tempat letak kereta minimum atau 218 tempat letak kereta sebagai 'tempat letak kereta pelawat'. MPPJ pastinya berpuas hati bahawa defendan kedua telah menyediakan tempat letak kereta minimum dan tempat letak kereta pelawat, tetapi dari segi nombor sahaja (lihat perenggan 108–109).

(2) Berkemungkinan bahawa defendan kedua tidak membuat apa-apa tanda-tanda tempat letak kereta pelawat di mana-mana lokasi dan defendan kedua juga tidak memaklumkan JMB atau plaintif lokasi tempat letak kereta pelawat pada bila-bila masa. Lokasi tempat letak kereta pelawat sukar difahami. Oleh kerana semua tempat letak kereta yang tidak diakses telah 'dihalang' menurut surat-surat yang dikeluarkan oleh defendan kedua kepada pemilik unit, agak sukar difahami bahawa ada mana-mana tempat letak kereta yang tinggal yang kekal digunakan sebagai tempat letak kereta pelawat (lihat perenggan 115).

(3) Penyewaan 439 tempat letak kereta oleh defendan pertama adalah 'urusan' bagi bahagian aksesori yang bebas daripada bahagian utama dan ini dilarang oleh ss 34(2) dan 69 Akta Hak Milik Strata 1985. 'Urusan' dalam Kanun Tanah Negara 1965 termasuk 'penyewaan'. Perkataan 'urusan dengan' dalam ss 34(2) dan 69 Akta Hakmilik Strata 1985, termasuk apa-apa urusan dengan melalui sewaan tempat letak kereta. Oleh itu, ini tidak sah dan jualan 394 tempat letak kereta oleh defendan kedua kepada defendan pertama jatuh di bawah s 24(b) Akta Kontrak 1950 dan harus dibatalkan sewajarnya (lihat perenggan 121–122).

(4) Bukan untuk MPPJ menentukan terma kontrak melalui DO. Walau bagaimanapun, defendan kedua tidak mematuhi syarat MPPJ dalam DO bagi penyediaan tempat letak kereta pelawat. Tempat letak kereta pelawat sepatutnya ditempatkan di perimeter tempat letak kereta. Defendan kedua dikehendaki menandakan tempat letak kereta pelawat tetapi tidak ada bukti bahawa defendan kedua menandakannya. Tidak ada susulan oleh JMB atau MC dengan MPPJ mengenai kegagalan oleh defendan

kedua untuk menandakan tempat letak kereta pelawat di perimeter tempat letak kereta (lihat perenggan 124).

(5) Ini adalah hal perkara undang-undang peribadi berkaitan isu ketaksahan. Tiada sokongan dalam hujahan bahawa plaintif sepatutnya memulakan semakan kehakiman terhadap Pentadbir Tanah dan Galian Wilayah Persekutuan untuk mendaftarkan 439 tempat letak kereta sebagai bahagian aksesori bawah nama defendan pertama kerana ketaksahan ini timbul daripada keterangan yang menyatakan niat dan penggunaan sebenar defendan pertama bagi tempat letak kereta berlebihan sebagai usaha komersil iaitu berurusan dengan tempat-tempat letak kereta dengan cara yang bebas daripada bahagian-bahagian utama. Tidak ada asas semakan kehakiman terhadap MPPJ berhubung dakwaan ketakpatuhan DO kerana dari segi bilangan, defendan pertama telah membina sejumlah tempat letak kereta yang mencukupi tetapi ini dirampas oleh defendan pertama yang menyerahkan tempat-tempat letak kereta kepada pemilik unit dan menjual lebihan tempat letak kereta kepada pihak bersekutu atau bersahabat dengan mereka, defendan pertama (lihat perenggan 130–131).]

Notes

For cases on management corporation, see 8(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5667–5694.

Cases referred to

Ideal Advantage Sdn Bhd v Palm Spring Joint Management Body & Anor [2014] 7 MLJ 812; [2014] 1 AMR 49; [2014] 1 CLJ 598, HC (refd)

Lee Nyan Hon & Bros Sdn Bhd v Metro Charm Sdn Bhd [2009] 6 MLJ 1; [2009] 6 CLJ 626, CA (refd)

Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay bin Abdullah [2015] 5 MLJ 619, FC (refd)

Palm Spring Joint Management Body & Anor v Muafakat Kekal Sdn Bhd & Anor [2016] 2 MLJ 191; [2016] 3 CLJ 665; [2016] 1 LNS 15, FC (refd)

Perbadanan Pengurusan Apartment Sea Park Blok & Ors v SEA Housing Corporation Sdn Bhd & Ors [2016] MLJU 942, HC (refd)

Perbadanan Pengurusan Palm Spring @ Damansara v Muafakat Kekal Sdn Bhd & Ors (No 2) [2015] MLJU 279; [2015] 5 MLRH 426, HC (refd)

Plaza Pekeliling Management Corporation v IGB Corporation Berhad & Anor [2003] MLJU 216, HC (refd)

Saluran Projek Sdn Bhd & Anor v Badan Pengurusan Bersama Krystal Point [2016] 1 LNS 728, HC (refd)

Legislation referred to

Contracts Act 1950 s 24, 24(a), (b), (e)
Limitation Act 1953

A National Land Code ss 5, 205(1), 220, 223, 224, 340, 340(1), (2), (2)(b), (2)(c), Parts 14, 15, 16, 17, Division IV
Strata Management Act 2013 s 143(2), (3)
Strata Titles Act 1985 ss 4, 5, 5(1), (2), 17(4), 34, 34(2), 69, 76(1), 79
Town and Country Planning Act 1976 ss 20, 22(3), (4)

B *Justin Voon (Justin Voon Chooi & Wing) for the plaintiff.*
Manpal Singh (Adrian Oswald and Noor Syuhada with him) (Manjit Singh Sachdev, Mohammad Radzi & Partners) for the first defendant.
Ting Lee Ping (Ringo Low & Assoc) for the second defendant.

C **Nantha Balan J:**

INTRODUCTION

D **[1]** These are my grounds of judgment after a full trial. This is a case concerning a management corporation's claim over car parks in a condominium project. The dispute is, inter alia, over the developer's obligation under the approved development order to provide 218 visitor's car parks and the legality of the developer's purported sale of 45 units of condominium to a E single purchaser (alleged to be 'closely related' to the developer) together with 439 car parks as accessory parcels which are said to be attached or appurtenant to these units. The 439 car parks are all located at the perimeter car park within the condominium. Essentially, the management corporation is seeking to impugn the developer's purported sale of 439 car parks (less 45 car parks) to a F single purchaser and to claim ownership of the car parks as part of common property.

[2] The related issue is also whether the purchaser of the 45 units of condominium, as owner of all these car parks may lawfully commercialise them G by renting them out. The rental rate for each car park is about RM120 per month from these 439 car parks, which would have resulted in an annual rental income of RM632,160 for the purchaser. The dispute herein necessitates a consideration of several provisions of the Strata Titles Act 1985, the National Land Code and the Strata Management Act 2013.

H PARTIES

[3] The plaintiff is the management corporation of the Palm Spring @ Damansara condominium ('the condominium'). Depending on the context, I the condominium shall be interchangeably referred to as 'the project'. The project is located in the Kota Damansara area. The first defendant ('D1') is the purchaser of 45 units of parcels in the condominium. The second defendant ('D2') is the developer of the condominium. It is alleged that D1 is related to D2 and received a windfall from D2 by the purchase of 45 units together with

439 car parks. The management corporation shall be interchangeably referred to as 'the MC' or 'plaintiff'. The MC was formed on 8 January 2008 (p 1, B15). The MC is a body corporate with perpetual succession and can sue and be sued (see: s 17(4) of the Strata Titles Act 1985). Prior to the MC's formation, the condominium was under the management of the joint management body ('JMB').

[4] The certificate of fitness ('CF') for the project was issued on 1 August 2005. Although the MC's certification of incorporation states that it was established on 8 January 2008, the certificate itself was issued on 7 April 2009. The MC's first annual general meeting was held on 11 September 2011. The MC's management committee was formed on 11 September 2011.

[5] The JMB was formed on 5 April 2008. But it appears that all along it was the JMB which was managing the project and not the MC. The development order for the project which was issued by the local authority, Majlis Perbandaran Petaling Jaya ('MPPJ') ('Majlis Bandaran Petaling Jaya' — 'MBPJ') is dated 9 October 2003('the DO'). The present suit was filed on 29 November 2017. The trial was conducted on 1–3 August 2017.

THE PROBLEM

[6] I now turn to the problem at hand. It is not a recent one. Rather it is a long standing problem and has been brewing for the past several years. Indeed, less than a year after the CF was issued, it became necessary for MPPJ to intervene in the dispute as the residents association for the condominium had issues with D2 over the visitor's car parks. In this regard, MPPJ convened a meeting on 23 March 2006, which was chaired by the late YB Dato' Hj Mohd Mokhtar bin Hj Ahmad Dahlan. He was the Selangor State Assemblyman for Kota Damansara at the material time. Pursuant to the meeting, MPPJ issued a letter dated 19 April 2006 which was addressed to D2 (p 1617, B4).

SUIT 58

[7] Some years later, D1 got embroiled in the tussle over the car parks. Hence, after the formation of the JMB, the dispute between D1 and the JMB over the visitor's car parks was taken to court and D1 filed Kuala Lumpur High Court Suit No S-22–58 of 2009 ('Suit 58') with respect to the 439 car parks. The JMB filed a counterclaim on the issue of visitor's car parks. The JMB also took the position that D1 was not entitled to have excessive car parks and that they are only entitled to have one car park per parcel unit. As such, the focus of the JMB's counterclaim was the 394 car parks (439 less 45 car parks). After a full trial, the High Court ruled in favour of the JMB in respect of the 394 car parks (including the 213 visitor's car parks). D1's claim was dismissed. The

decision of the High Court is reported as: *Ideal Advantage Sdn Bhd v Palm Spring Joint Management Body & Anor* [2014] 7 MLJ 812; [2014] 1 AMR 49 (HC). D1 appealed to the Court of Appeal. The appeal was registered as Civil Appeal No No-02–1358–06 of 2013 ('Appeal 1358'). But, before Appeal 1358 could be heard, the JMB was declared as null and void in a separate legal proceeding. As such, this resulted in the JMB not having locus standi vis a vis Suit 58 and in Appeal 1358 as well.

[8] In this regard, it is necessary to refer briefly to the decision of the Federal Court in *Palm Spring Joint Management Body & Anor v Muafakat Kekal Sdn Bhd & Anor* [2016] 2 MLJ 191; [2016] 3 CLJ 665; [2016] 1 LNS 15 which declared that the JMB had no locus standi. Paragraphs [32]–[33] of the judgment of the Federal Court read as:

> [32] In the instant case the MC was established on 8 January 2008 while the JMB was established on 5 April 2008. This means to say that on the date of the purported establishment of the JMB, the MC was already in existence. The fact that no general meeting of the MC was called until three years down the line, in our view, does not affect the legality of the MC. It is thus contrary to the legislative scheme under Act 318 and Act 663 to have the JMB established after the establishment of the MC, which the appellants in the instant case purported to do.
>
> [33] In the result, *we agree with the Court of Appeal that the JMB was unlawfully constituted and its establishment is thus null and void ab initio.* (Emphasis added.)

[9] Hence, events overtook the JMB and in view of the ruling by the Federal Court with regard to the JMB's lack of legal standing, the Court of Appeal allowed D1's appeal in Appeal 1358 and set aside the order of the High Court in Suit 58. However, in the current proceedings before me, it is common ground that Appeal 1358 was not determined by the Court of Appeal on its merits. And so although Appeal 1358 was 'allowed', the decision of the Court of Appeal was in reality, based purely on the JMB's lack of locus standi.

[10] After Appeal 1358 was disposed off in the rather unfortunate circumstances as mentioned earlier, the problem with respect to the visitor's car parks and excessive car parks in D1's name still persisted and the MC accordingly filed the present suit on 29 November 2016. However, in view of the fact that in Suit 58, the parties thereto (*save for D2*) had already tendered a large body of documentary and oral evidence, by consent of the parties to the present proceedings, it was agreed that the notes of evidence and documents in Suit 58 would be used in the present suit. As such, this court gave the following directions on 17 April 2017 during case management which read as follows:

> The evidence given in the other Suit No S-22-58-2009 will be adopted in this Suit — If there are any additional questions, notice has to be given to the other side to recall or Subpoena the witness again for further questions. The 2nd Defendant will look into the cross-examination of the evidence in the previous Suit and see if they

are sufficient. Since the 1st Defendant has indicated that Puan Sharipah Marhaini Binti Syed Ali (the Pengarah Perancang Bandar from Majlis Bandaraya Petaling Jaya) need to be recalled, the Plaintiff would subpoena her anyway (hereinafter referred to as 'the said Direction').

[11] I turn now to the DO. The DO stipulates, inter alia, that:

(a) the project shall have six blocks (1–6) comprising of 2180 residential units; and

(b) 10% of the car parks shall be 'visitor's car parks'.

[12] The DO specifically states that car parks have to be provided as per the endorsement which reads as 'tempat letak kereta (1 TLK/ unit + 10%)'. Needless to say, the endorsement on the DO has been interpreted differently by the parties. The plaintiff claims that as per the endorsement on the DO, each unit of condominium has to be 'allocated' with one car park and that D2 should provide 218 visitor's car parks. But D2 maintains that all that they have to do under the DO is to provide the requisite number of car parks and to ensure that there is a minimum of 2180 car parks plus 10% (visitor's car parks). D2 claim that they had in fact provided 2861 car parks, which therefore exceeds the requirements under the DO. But the plaintiff maintains that there were only 2479 car parks that were built by D2.

THE CLAIM

[13] In the present suit, the plaintiff has claimed for the following reliefs:

(i) A declaration that 40 sale and purchase agreements between the Second and First Defendants dated 7/12/2005 to the extent that the sale of the said 394 Accessory Parcels as follows by the Second Defendant to the First Defendant and any further transfers of the same (if any) are invalid and unenforceable:

No	Strata Title	Accessory Parcels (Car Parks)
1	Title No PN 26623, Building No M2, Floor No 16, Parcel No 568	A33, A218, A596, A597, A598, A599, A600, A601, A602 & A603
2	Title No PN 26623, Building No M2, Floor No 5, Parcel No 360	A471, A472, A473, A474, A475, A476, A477, A478 & A479
3	Title No PN 26623, Building No M2, Floor No 4, Parcel No 352	A392, A393, A394, A395, A396, A397, A398, A399 & A400
4	Title No PN 26623, Building No M2, Floor No 4, Parcel No 351	A380, A381, A382, A383, A384, A385, A386, A387 & A388

5	Title No PN 26623, Building No M2, Floor No 12, Parcel No 495	A310, A510, A511, A512, A513, A514, A515, A516, A517, A714, A715 & A716
6	Title No PN 26623, Building No M2, Floor No 4, Parcel No 347	A375, A376, A377, A378, A379, A419, A420, A421 & A422
7	Title No PN 26623, Building No M2, Floor No 3, Parcel No 329	A401, A402, A403, A404, A405, A406, A407, A408 & A409
8	Title No PN 26623, Building No M2, Floor No 12, Parcel No 496	A119, A258, A502, A503, A504, A505, A506, A507, A508 & A509
9	Title No PN 26623, Building No M2, Floor No 4, Parcel No 341	A423, A424, A425, A426, A427, A428, A429, A430 & A431
10	Title No PN 26623, Building No M2, Floor No 11, Parcel No 468	A259, A260, A494, A495, A496, A497, A498, A499, A500 & A501
11	Title No PN 26623, Building No M2, Floor No 13, Parcel No 509	A29, A60, A68, A69, A71, A534, A535, A536, A537, A538, A539, A540 & A541
12	Title No PN 26623, Building No M2, Floor No 8, Parcel No 423	A5, A22, A25, A35, A45, A46, A47, A125 & A456
13	Title No PN 26623, Building No M2, Floor No 7, Parcel No 405	A457, A458, A459, A460, A461, A462, A463, A464 & A465
14	Title No PN 26623, Building No M2, Floor No 13, Parcel No 513	A53, A55, A65, A70, A76, A526, A527, A528, A529, A530, A531, A532 & A533
15	Title No PN 26623, Building No M2, Floor No 18, Parcel No 600	A441, A442, A443, A444, A445, A723, A724, A725, A726, A727, A728, A729 & A730
16	Title No PN 26623, Building No M2, Floor No 18, Parcel No 603	A251, A252, A253, A300, A747, A748, A749, A750 & A751
17	Title No PN 26623, Building No M2, Floor No 18, Parcel No 602	A451, A452, A453, A454, A455, A739, A740, A741, A742, A743, A744, A745 & A746
18	Title No PN 26623, Building No M2, Floor No 6, Parcel No 387	A480, A481, A482, A483, A484, A485, A486, A487 & A488
19	Title No PN 26623, Building No M2, Floor No 5, Parcel No 364	A432, A433, A434, A435, A466, A467, A468, A469 & A470

20	Title No PN 26623, Building No M2, Floor No 14, Parcel No 532	A235, A270, A325, A550, A551, A552, A553, A554, A555, A556 & A557
21	Title No PN 26623, Building No M2, Floor No 17, Parcel No 588	A644, A645, A646, A647, A648, A649, A650 & A651
22	Title No PN 26623, Building No M2, Floor No 18, Parcel No 590	A362, A363, A364, A365, A366, A367, A368 & A369
23	Title No PN 26623, Building No M2, Floor No 14, Parcel No 531	A558, A559, A560, A561, A562, A563, A564, A565, A580, A581, A582, A583, A584 & A585
24	Title No PN 26623, Building No M2, Floor No 18, Parcel No 591	A355, A356, A357, A358, A359, A360, A361 & A418
25	Title No PN 26623, Building No M2, Floor No 14, Parcel No 520	A230, A573, A574, A575, A576, A577, A578, A579, A586 & A587
26	Title No PN 26623, Building No M2, Floor No 18, Parcel No 592	A410, A411, A412, A413, A414, A415, A416 & A417
27	Title No PN 26623, Building No M2, Floor No 18, Parcel No 597	A254, A255, A301, A311, A370, A371, A372, A373 & A374
28	Title No PN 26623, Building No M2, Floor No 14, Parcel No 519	A566, A567, A568, A569, A570, A571 & A572
29	Title No PN 26623, Building No M2, Floor No 18, Parcel No 599	A446, A447, A448, A449, A450, A731, A732, A733, A734, A735, A736, A737 & A738
30	Title No PN 26623, Building No M2, Floor No 17, Parcel No 574	A436, A437, A438, A439, A440, A712, A713, A717, A718, A719, A720, A721 & A722
31	Title No PN 26623, Building No M2, Floor No 13, Parcel No 514	A518, A519, A520, A521, A522, A523, A524 & A525
32	Title No PN 26623, Building No M2, Floor No 13, Parcel No 504	A117, A242, A243, A542, A543, A544, A545, A546, A547, A548 & A549
33	Title No PN 26623, Building No M2, Floor No 17, Parcel No 583	A84, A302, A303, A305, A306, A307, A652, A653, A654, A655, A656, A657, A658 & A659
34	Title No PN 26623, Building No M2, Floor No 15, Parcel No 548	A588, A589, A590, A591, A593, A594 & A595
35	Title No PN 26623, Building No M2, Floor No 16, Parcel No 555	A620, A621, A622, A623, A624, A625, A626 & A627

36	Title No PN 26623, Building No M2, Floor No 17, Parcel No 580	A304, A354, A390, A391, A660, A661, A662, A707, A708, A709, A710 & A711
37	Title No PN 26623, Building No M2, Floor No 16, Parcel No 567	A604, A605, A606, A607, A608, A609, A610 & A611
38	Title No PN 26623, Building No M2, Floor No 16, Parcel No 563	A612, A613, A614, A615, A616, A617, A618 & A619
39	Title No PN 26623, Building No M2, Floor No 17, Parcel No 586	A628, A629, A630, A631, A632, A633, A634 & A635
40	Title No PN 26623, Building No M2, Floor No 17, Parcel No 585	A636, A637, A638, A639, A640, A641, A642 & A643
		394 Accessory Parcels (Car Parks)

(ii) An order that the Registrar of Land Titles Selangor and/or the Director General of Lands and Mines Selangor and/or the Land Administrator and/or the authority concerned to cancel the entry of the said 394 Accessory Parcels from the strata titles plan and the strata titles as follows and the said 394 accessory parcels are common properties owned and controlled by the Plaintiff:

No	Strata Title	Accessory Parcels (Car Parks) To be cancelled	Accessory Parcel (Car Parks) left
1	Title No PN 26623, Building No M2, Floor No 16, Parcel No 568	A33, A218, A596, A597, A598, A599, A600, A601, A602 & A603	A31
2	Title No PN 26623, Building No M2, Floor No 5, Parcel No 360	A471, A472, A473, A474, A475, A476, A477, A478 & A479	A176
3	Title No PN 26623, Building No M2, Floor No 4, Parcel No 352	A392, A393, A394, A395, A396, A397, A398, A399 & A400	A82
4	Title No PN 26623, Building No M2, Floor No 4, Parcel No 351	A380, A381, A382, A383, A384, A385, A386, A387 & A388	A81
5	Title No PN 26623, Building No M2, Floor No 12, Parcel No 495	A310, A510, A511, A512, A513, A514, A515, A516, A517, A714, A715 & A716	A118
6	Title No PN 26623, Building No M2, Floor No 4, Parcel No 347	A375, A376, A377, A378, A379, A419, A420, A421 & A422	A80
7	Title No PN 26623, Building No M2, Floor No 3, Parcel No 329	A401, A402, A403, A404, A405, A406, A407, A408 & A409	A86

8	Title No PN 26623, Building No M2, Floor No 12, Parcel No 496	A119, A258, A502, A503, A504, A505, A506, A507, A508 & A509	A112
9	Title No PN 26623, Building No M2, Floor No 4, Parcel No 341	A423, A424, A425, A426, A427, A428, A429, A430 & A431	A78
10	Title No PN 26623, Building No M2, Floor No 2, Parcel No 306	None	A89
11	Title No PN 26623, Building No M6, Floor No 4, Parcel No 1798	None	A21
12	Title No PN 26623, Building No M2, Floor No 11, Parcel No 468	A259, A260, A494, A495, A496, A497, A498, A499, A500 & A501	A101
13	Title No PN 26623, Building No M2, Floor No 13, Parcel No 509	A29, A60, A68, A69, A71, A534, A535, A536, A537, A538, A539, A540 & A541	A28
14	Title No PN 26623, Building No M2, Floor No 8, Parcel No 423	A5, A22, A25, A35, A45, A46, A47, A125 & A456	A2
15	Title No PN 26623, Building No M2, Floor No 7, Parcel No 405	A457, A458, A459, A460, A461, A462, A463, A464 & A465	A129
16	Title No PN 26623, Building No M2, Floor No 13, Parcel No 513	A53, A55, A65, A70, A76, A526, A527, A528, A529, A530, A531, A532 & A533	A27
17	Title No PN 26623, Building No M2, Floor No 18, Parcel No 600	A441, A442, A443, A444, A445, A723, A724, A725, A726, A727, A728, A729 & A730	A104
18	Title No PN 26623, Building No M2, Floor No 18, Parcel No 603	A251, A252, A253, A300, A747, A748, A749, A750 & A751	A231
19	Title No PN 26623, Building No M2, Floor No 18, Parcel No 602	A451, A452, A453, A454, A455, A739, A740, A741, A742, A743, A744, A745 & A74	A128

20	Title No PN 26623, Building No M2, Floor No 6, Parcel No 387	A480, A481, A482, A483, A484, A485, A486, A487 & A488	A137
21	Title No PN 26623, Building No M2, Floor No 5, Parcel No 364	A432, A433, A434, A435, A466, A467, A468. A469 & A470	A174
22	Title No PN 26623, Building No M2, Floor No 14, Parcel No 532	A235, A270, A325, A550, A551, A552, A553, A554, A555, A556 & A557	A99
23	Title No PN 26623, Building No M2, Floor No 17, Parcel No 588	A644, A645, A646, A647, A648, A649, A650 & A651	A87
24	Title No PN 26623, Building No M2, Floor No 18, Parcel No 590	A362, A363, A364, A365, A366, A367, A368 & A369	A224
25	Title No PN 26623, Building No M2, Floor No 14, Parcel No 531	A558, A559, A560, A561, A562, A563, A564, A565, A580, A581, A582, A583, A584 & A585	A61
26	Title No PN 26623, Building No M2, Floor No 18, Parcel No 591	A355, A356, A357, A358, A359, A360, A361 & A418	A105
27	Title No PN 26623, Building No M2, Floor No 14, Parcel No 520	A230, A573, A574, A575, A576, A577, A578, A579, A586 & A587	A88
28	Title No PN 26623, Building No M2, Floor No 18, Parcel No 592	A410, A411, A412, A413, A414, A415, A416 & A417	A116
29	Title No PN 26623, Building No M2, Floor No 18, Parcel No 597	A254, A255, A301, A311, A370, A371, A372, A373 & A374	A245
30	Title No PN 26623, Building No M2, Floor No 14, Parcel No 519	A566, A567, A568, A569, A570, A571 & A572	A72
31	Title No PN 26623, Building No M2, Floor No 18, Parcel No 599	A446, A447, A448, A449, A450, A731, A732, A733, A734, A735, A736, A737 & A738	A120

32	Title No PN 26623, Building No M2, Floor No 17, Parcel No 574	A436, A437, A438, A439, A440, A712, A713, A717, A718, A719, A720, A721 & A722	A130
33	Title No PN 26623, Building No M2, Floor No 13, Parcel No 514	A518, A519, A520, A521, A522, A523, A524 & A525	A113
34	Title No PN 26623, Building No M6, Floor No 3, Parcel No 1781	None	A23
35	Title No PN 26623, Building No M6, Floor No 2, Parcel No 1764	None	A24
36	Title No PN 26623, Building No M2, Floor No 13, Parcel No 504	A117, A242, A243, A542, A543, A544, A545, A546, A547, A548 & A549	A115
37	Title No PN 26623, Building No M2, Floor No 17, Parcel No 583	A84, A302, A303, A305, A306, A307, A652, A653, A654, A655, A656, A657, A658 & A659	A26
38	Title No PN 26623, Building No M2, Floor No 15, Parcel No 548	A588, A589, A590, A591, A593, A594 & A595	A73
39	Title No PN 26623, Building No M2, Floor No 16, Parcel No 555	A620, A621, A622, A623, A624, A625, A626 & A627	A238
40	Title No PN 26623, Building No M2, Floor No 17, Parcel No 580	A304, A354, A390, A391, A660, A661, A662, A707, A708, A709, A710 & A711	A79
41	Title No PN 26623, Building No M2, Floor No 16, Parcel No 567	A604, A605, A606, A607, A608, A609, A610 & A611	A111
42	Title No PN 26623, Building No M2, Floor No 16, Parcel No 563	A612, A613, A614, A615, A616, A617, A618 & A619	A233
43	Title No PN 26623, Building No M1, Floor No 16, Parcel No 281	None	A32
44	Title No PN 26623, Building No M2, Floor No 17, Parcel No 586	A628, A629, A630, A631, A632, A633, A634 & A635	A91

45	Title No PN 26623, Building No M2, Floor No 17, Parcel No 585	A636, A637, A638, A639, A640, A641, A642 & A643	A90
	Total Amount 439 Accessory Parcels (Car Parks)	**394** Accessory Parcels (Car Parks)	**45** Accessory Parcels (Car Parks)

(iii) A declaration that 213 units of car park in Palm Spring Condominium @ Damansara known as A588, A589, A590, A591, A593, A594, A595, A612, A613, A614, A615, A616, A617, A618, A619, A620, A621, A622, A623, A624, A625, A626, A627, A739, A740, A741, A742, A743, A744, A745, A746, A731, A732, A733, A734, A735, A736, A737, A738, A723, A724, A725, A726, A727, A728, A729, A730, A712, A713, A717, A718, A719, A720, A721, A722, A707, A708, A709, A710, A711, A660, A661, A662, A652, A653, A654, A655, A656, A657, A658, A659, A644, A645, A646, A647, A648, A649, A650, A651, A628, A629, A630, A631, A632, A633, A634, A635, A747, A748, A749, A750, A751, A494, A495, A496, A497, A498, A499, A500, A501, A502, A503, A504, A505, A506, A507, A508, A509, A566, A567, A568, A569, A570, A571, A572, A558, A559, A560, A561, A562, A563, A564, A565, A580, A581, A582, A583, A584, A585, A550, A551, A552, A553, A554, A555, A556, A557, A542, A543, A544, A545, A546, A547, A548, A549, A534, A535, A536, A537, A538, A539, A540, A541, A526, A527, A528, A529, A530, A531, A532, A533, A518, A519, A520, A521, A522, A523, A524, A525, A510, A511, A512, A513, A514, A515, A516, A517, A714, A715, A716, A573, A574, A575, A576, A577, A578, A579, A586, A587, A596, A597, A598, A599, A600, A601, A602, A603, A604, A605, A606, A607, A608, A609, A610, A611, A636, A637, A638, A639, A640, A641, A642, A643 are held under Title PN 26623, Lot No 44938. Pekan Baru Sungai Buloh, Daerah Petaling, Negeri Selangor and/or from the units taken according to the Table in ~~paragraph~~ prayer (ii) above, are the Condominium Visitors' Car Park and are common properties owned and controlled by the Plaintiff and vested in the Plaintiff;

(iv) A declaration that the Defendants are not entitled to any rental collection for the car parks in Palm Spring Condominium @ Damansara including the 439 Accessory Parcels following the Table in ~~paragraph~~ prayer (ii) above;

(v) A perpetual prohibitory injunction against the First and Second Defendants to refrain and/or prohibit the First and Second Defendants, through themselves or their directors, employees or representatives or others,from taking any action in rental collection or other profits from any of the car parks in Palm Spring Condominium @ Damansara including the 439 Accessory Parcels as listed in the Table in (ii) above;

(vi) Taking of accounts as of today to be assessed by the Registrar if necessary, for all rentals or profits collected and/or have been collected by the First Defendant and/or Second Defendant and/or the agent or employee or nominee of the First Defendant and/or Second Defendant for ~~394~~ any car park in Palm Spring Condominium @ Damansara including the 439 Accessory Parcels as tabulated in the Table in prayer (ii) above, wherein the Director of the First and/or Second Defendants respectively

shall affirm, file and serve to the Solicitors of the Plaintiff, an affidavit stating all the rentals or profits which have been collected by the Defendants through the 394 Accessory Parcels at all material times, within eight (8) days from the date of judgment/order;

(vii) Judgment for the Plaintiff for the sum stated in paragraph (vi) above which has to be paid by the First and Second Defendants respectively to the Plaintiff;

(viii) General damages to be assessed by the Registrar and to be paid by the Defendants respectively to the Plaintiff with interests at 5% per annum from the date of the Writ herein until full settlement;

(ix) Costs to be paid to the Plaintiff by the First and Second Defendants;

(x) Liberty to apply to be given to the Plaintiff for the above; and

(xi) Any other orders and/or reliefs for the Plaintiff that this Honourable Court deems just and/or fit.

THE DISPUTE

[14] The dispute here arises out of the sale of 45 condominium units by D2 to D1. The sale was done pursuant to four sale and purchase agreements ('SPAs') dated 27 June 2005 and a further set of 41 SPAs which were all dated 7 December 2005. It may be recalled that CF was issued on 1 August 2005. According to the plaintiff, out of the 45 units which were sold to D1, only five units were allocated with one accessory — car park parcel as required by the DO, while the other 41 units had been allocated with multiple accessory car park parcels ranging from 8–15 car parks for each unit of condominium. The plaintiff describes these 'multiple' car parks pejoratively as 'excessive' car parks. In painting a sinister picture of the sale of these condominium units with 'excessive' car parks, the plaintiff alleges that at all material times, the market price of one unit of car park parcel if sold by D2 to purchasers would be RM20,000 for each car park, whereas the maximum purchase price among the 45 condominium units which were sold to D1, was only RM150,000. The plaintiff therefore contends that this is highly incredible when the value of 8–15 accessory car parks is between RM160,000 (RM20,000 x 8) to RM300,000 (RM20,000 x 15) and that is higher than the respective relevant purchase price among the 45 condominium units and this would mean that the accessory car park parcels were given to D1 for free and/or without consideration.

[15] The details of the 45 condominium units and the number of car parks that were allocated to each of the units is as shown in the table below:

No	Refer (p/g)	Unit Parcel	Particulars (RM)/(Square Feet)	(RM) per square feet	Parking Lots

1	632–649 (8)	B-1610	C3 1,001 square feet RM115,444.00	115	13
2	1226–1243 (41)	B-1501	A1 1,205 square feet RM130.944.00	108	11
3	614–631 (7)	B-1617	B1 936 square feet RM107,944.00	115	14
4	596–613 (6)	B-1701	A1 1,205 square feet RM 134,444.00	111	14
5	578–595 (5)	B-1703	A2 1,259 square feet RM136,444.00	108	14
6	560–577 (4)	B-1703A	B2 1023 square feet RM114,944.00	112	14
7	740–757 (14)	B-1707	C4 936 square feet RM110,444.00	117	10
8	722–739 (13)	B-1709	C3 1001 square feet RM117,744.00	117	10
9	704–721 (12)	B-1712	C4 936 square feet RM110,444.00	117	9
10	831–848 (19)	B-1715	B2 1023 square feet RM114,944.00	112	9
11	813–830 (18)	B-1717	B1 936 square feet RM 110,444.00	117	9
12	1262–1279 (43)	B-1603	A2 1259 square feet RM133,944.00	106	9
13	923–940 (24)	B-416	A2 1,259 square feet RM 124,944.00	99.2	10
14	1067–1081 (32)	B-1315	B2 1023 square feet RM109,444.00	106	8
15	1082–1099 (33)	B-1303	A2 1,259 square feet RM130,944.00	104	15
16	1208–1225 (40)	B-1317	B1 936 square feet RM104,944.00	112	11
17	506–523 (1)	B-1405	C1 926 square feet RM101,944.00	110	8
18	1244–1261 (42)	B-1503	A2 1,259 square feet RM132,944.00	105	9
19	524–541 (2)	B-1509	C3 1001 square feet RM 114.444.00	114	9
20	542–559 (3)	B-1515	B2 1023 square feet RM111.444.00	108	9
21	686–703 (11)	B-1601	A1 1,205 square feet RM131,944.00	109	9

22	668–685(10)	B-1603A	B2 1,023 square feet RM 112,444.00	109	9
23	650–667(9)	B-1606	C2 915 square feet RM102,944.00	112	15
24	1031–1048 (30)	B-1016	A2 1,259 square feet RM127,944.00	101	11
25	1049–1066 (31)	B-1101	A1 1,205 square feet RM 126,944.00	105	11
26	1190–1207 (31)	B-1103	A2 1,259 square feet RM 128,944.00	102	13
27	1172–1189 (38)	B-1201	A1 1,205 square feet RM127.944.00	106	9
28	794–812 (17)	B-209	C3 1,001 square feet RM105,444.00	105	10
29	1154–1171 (37)	B-1203	A2 1259 square feet RM129,944.00	102.8	14
30	1136–1153 (36)	B-1209	C3 1,001 square feet RM111,444.00	111	14
31	1118–1135 (35)	B-1216	A2 1259 square feet RM 129,944.00	103	12
32	1100–1117 (34)	B-1301	A1 1,205 square feet RM128,944.00	107	12
33	1280–1300 (44)	B-116	A2 1,259 square feet RM150,000.00	119	1
34	1013–1030 (29)	B-301	A1 1,205 square feet RM122,444.00	101	10
35	995–1012 (28)	B-303	A2 1,259 square feet RM 124,444.00	98	10
36	977–994 (27)	B-309	C3 1001 square feet RM105,944.00	105	10
37	959–976(26)	B-318	A1 1,205 square feet RM 122,444.00	101	10
38	941–958 (25)	B-410	C3 1001 square feet RM106,444.00	106	10
39	906–922 (23)	B-503	A2 1,255 square feet RM125,444.00	99.6	10
40	776–793 (16)	B-603	A2 1259 square feet RM125,444.00	100	10
41	758–775(15)	B-703	C1 1259 square feet RM126,444.00	100	10
42	1301–1318 (45)	A-1501	A1 1205 square feet RM122,444.00	101	10

43	887–905 (22)	F-113A	C1 926 square feet RM72,000.00	77	1
44	868–886(21)	F-213A	C1 926 square feet RM74,000.00	79.9	1
45	849–867 (20)	F313A	C1 926 square feet RM76,000.00	82	1
Total			**RM5,288,004.00**		**439**

[16] It was emphasised for the plaintiff that based on the information and details as stated in the abovementioned table, the total purchase price that was paid by D1 for 45 condominium units is *RM5,288,004*. It was common ground that at the material time, D2 was selling car parks at RM20,000 per car park. Hence, at the rate of RM20,000 per car park, the *total value of the 439 car parks would be RM8,780,000 (439 x RM20,000).* And if the 45 condominium units are allocated with one car park per unit and these are deducted from 439, than the value of the car parks would be *RM7,880,000 (394 x RM20,000).* The plaintiff's case is that 439 car parks (less 45 car parks) were given to D1 for no consideration (free of charge). The thrust of the plaintiff's case is that the 394 car parks are 'common property'.

[17] The plaintiff also alleges that after obtaining vacant possession of 45 condominium units together with 439 accessory car park parcels, D1 and/or D2 carried out car park rental business in the condominium wherein they had been renting out large numbers of car park from the 439 accessory car parks. According to the plaintiff, these car parks were rented out to the residents and/or tenants for a fee of about RM120 every month per car park. D1's average annual income from car park rentals is RM632,160. According to the plaintiff, the whole intention of D1 and D2, from the outset, was to carry out a commercial business of letting the 439 car parks in the condominium which is a residential condominium.

[18] Therefore, the plaintiff alleges that as a consequence of the defendants' action as described above, the plaintiff and the residents have been seriously prejudiced where, inter alia:

(a) out of the 2,449 car parks which were built, 2,180 car parks should have been given to 2,180 condominium units (*per the DO*), 218 car parks allocated for the visitors and there should be 51 extra car park parcels;

(b) while 439 car parks were taken by D1 for only 45 condominium units, there are only 2010 car parks left for 2,135 condominium units (2,180 minus 45) and there are no visitor's car parks left;

(c) the acute shortage of car park is clearly caused by the defendants; and

(d) the defendants have unreasonably created a critical demand for car park in order to get monetary profit from the car park rental business.

[19] The plaintiff alleges that D1's 45 parcels should have only one car park per unit. If 45 car parks are deducted, then the balance is 394. Hence, the plaintiff contends that any transfer or giving of the 394 car parks to D1 by D2 based on the SPAs is invalid and ought to be revoked as:

(a) it has breached the DO;

(b) it has breached ss 34(2) and 69 of the Strata Titles Act 1985;

(c) it was not transferred or sold with any consideration and/or valuable consideration;

(d) it is against public policy; and

(e) the registration of the 394 car parks in the strata title in D1's name is void ab initio and ought to be cancelled/set aside under, inter alia, s 340(2)(b) and (c) of the National Land Code read together with s 5 of the Strata Titles Act 1985.

[20] According to the plaintiff, MPPJ issued a letter dated 19 April 2006 (p 1617, B4) which directed D2 to mark 239 perimeter car parks in the condominium as visitor's car parks ('MPPJ's letter'). According to the plaintiff, 213 out of the 239 perimeter car parks were identified to be part of the 439 car parks allocated for the 45 condominium units of D1.

[21] MPPJs letter reads as:

> Tarikh: 19 April 2006
>
> Muafakat Kekal Sdn Bhd 3rd Floor, Wisma Fumah 1 & 3, Jalan Ambong Dua Kepong Baru 52100 Kuala Lumpur Tuan,
>
> PERMOHONAN PEMBANGUNAN BERCAMPUR YANG MENGANDUNGI 6 BLOK BANGUNAN 16-25 TINGKAT, APARTMENT KOS SEDERHANA 2180 UNIT DAN KEMUDAHAN SURAU, TADIKA, DEWAN ORANG RAMAI, KELAB, GELANGGANG TENIS DIATAS LOT SEKSYEN 13, KOTA DAMANSARA
>
> – Tempat Letak Kenderaan Pelawat
>
> Adalah saya dengan segala hormatnya diarah merujuk kepada perkara tersebut di atas.
>
> 2. Sukacita dimaklumkan mesyuarat Aduan Penduduk Palm Spring @ Damansara yang telah diadakan pada 23.3.2006 dipengerusikan oleh Y.B Dato' Hj. Mohd Mokhtar B. Hj. Ahmad Dahlan telah *memutuskan untuk pemaju menandakan 239 petak tempat letak kereta pelawat berdasarkan pelan kelulusan pada 23.12.2000.*

3. Sehubungan itu, *pihak tuan diminta untuk menandakan 239 petak tempat letak kereta pelawat didalam pelan teratur dan di atas tapak dalam tempoh 14 hari dari tarikh surat ini disampaikan.*

Sekian, terima kasih.

'KEJUJURAN DAN KETEKUNAN'

Saya yang menurut perintah,

(SHARIPAH MARHAINI SYED ALI, PPT, APPM)

Pengarah,

Jabatan Perancangan Pembangunan

bp Yang Dipertua Majlis Perbandaran Petaling Jaya

(marhaini@mppj.gov.my).

(Emphasis added.) (p 1617, B4)

[22] The plaintiffs position is that, except for one car park that shall be assigned to every unit of the 45 condominium units as per the DO, the other 394 car parks (which include the 213 visitor's car parks) cannot validly belong to D1 because they are being used or dealt with separately from the condominium in contravention of the law, namely s 4 of the Strata Titles Act 1985 which defines 'accessory parcel' and is therefore in contravention of ss 34(2) and 69 of the Strata Titles Act 1985.

[23] As stated earlier, the judgment of the High Court in Suit 58 was set aside by the Court of Appeal on 26 September 2016 on the basis that in an entirely separate proceeding, the JMB was declared as being void ab initio. The plaintiff claims that subsequent to the setting aside of the High Court judgment in Suit 58, D1 resumed their activities in renting out the car parks and even issued blank receipts without the name of D1 on it. D1 also wrote a letter dated 8 November 2016 as they wanted to repaint its 'private car parks'. This was disputed by the plaintiff via letter dated 21 November 2016 and D1's solicitors (*Messrs Manjit Singh Sachdev, Mohammad Radzi and Partners*) then wrote a letter dated 29 November 2016 to, inter alia, allege that the car parks belonged 'exclusively' to D1 and that they have the 'lawful right' to rent out the car parks.

[24] In so far as the requirement under the DO for D2 as the developer to provide the visitor's car parks is concerned, the plaintiff claims that D2 is unable to crediblv show the location of the 213 visitor's car parks at all. According to the plaintiff, it is now many years after purchasers/residents have taken possession of the condominium units and yet the 213 visitor's car parks have not been designated. It was contended for the plaintiff that logically, these 213 visitor's car parks would or should have been handed over to the

management at the time vacant possession was given to the purchasers. But they were not duly handed over. In the present suit, D2 maintained that the 218 visitor's car parks can be found in B1 Floor of Block G (p 194, B12). But the plaintiff maintains that this is rather belated and is an afterthought. In any event the plaintiff takes the position that the so-called visitor's car parks are not at level B1 Floor of Block G as there are residents whose are cars already occupying these car parks. In this regard, the plaintiff has obtained examples of contemporaneous documents issued by D2 to residents and has obtained letters and statutory declarations by the residents in order to show that these 218 car parks alleged by D2 to be visitor's car parks have in fact been 'given' to the residents for their exclusive use and where the residents are now claiming that the car parks belong to them and/or they have rights to the said car parks.

[25] An instance of a car park that was 'given' by D2 to a unit owner is seen from the evidence of Tan Sead ('PW1'). He referred to D2's letter 11 January 2005 (pp 136–137, B2) which reads as:

> e. Your car park bay(s) which is depicted in green on the attached plan

[26] Consequently, PW1 has been using car park lot marked as P7 and the car park lot '7' is marked as 'P7' in photograph at p 157, B2. In his statutory declaration dated 24 January 2017 (pp 131–132, B2), which was filed for purposes of the MC's application for an injunction, he said:

> 3. I strongly disagree that the said shaded carparks are 'visitor's carparks' where these carparks are largely used daily by residents. When I purchased my Unit, I needed a carpark and the Developer informed me that I am given the specific use of a carpark which is identified and located as *P7* in the said Plan ('the said Carpark') which is one of the shaded carparks in the said Plan in Exhibit '1'. I have used a red pen to circle the said Carpark in Exhibit '1'.
>
> I have:
>
> (i) A copy of the letter giving me vacant possession of my Unit where this carpark is also stated;
>
> (ii) A plan of the location of the carpark given to me by the Developer.
>
> A copy of the aforesaid documents is shown to me and annexed here as Exhibit '2'.
>
> 4. I have been using the said Carpark for many years since about *2005* and I have no other place to park my car. It would be very unfair and prejudicial to me if this Carpark is taken away from me or re-designated as a 'visitors' carpark'. I have never heard from the Developer or anyone before this that any of the carparks in the basement of Block G as stated in the said Plan is a 'visitors' carpark'. I state that the said Carpark belong to me and *I maintain my rights to the said Carpark.* (Emphasis added.)

[27] During the trial, PW1 testified that 'when I purchased my unit, I

needed a car park and developer informed me that I am given the specific use of a car park which is identified and located as P7 in the said plan ...'. As such, because of D2 having 'given away' the car park to residents, the plaintiff claims that D2 cannot show where the visitor's car parks are located and that the car parks which have been identified by D2 as being visitor's car parks, are car parks which are already encumbered. Thus, the plaintiff claims that this situation or predicament has occurred because the car parks which ought to have been allocated to the residents and 218 car parks which ought to have been designated as visitor's car parks, have all been improperly 'sold' by D2 to D1. Further, it is alleged that despite D2 making a bare allegation that purportedly 2,861 car parks were built, yet D2 is unable to credibly show that there are in fact 218 units of visitor's car parks which are free of any encumbrances/claims.

THE ISSUES

[28] The issues to be tried are as follows:

(a) whether the plaintiff can challenge the compliance of the DO by the D2 and the registration of the car parks in favour of D1 via a private legal suit and not through a public law action?

(b) whether the plaintiff has the locus standi under the provision of Strata Titles Act 1985, to commence legal action against D1 and/or D2 to claim for ownership rights over 394 (439–45) accessory car parks registered under the 45 condominium units registered under D1;

(c) whether the plaintiff as the MC can rely on the approved layout plan of a DO issued by MPPJ to claim for ownership rights over 394 (439–45) accessory car parks registered under the 45 condominium units under D1 on the basis that they are common property under the Strata Titles Act 1985;

(d) whether the plaintiff's claim against D2 is barred by the Limitation Act 1953 in view of the fact that since the incorporation of the plaintiff on 8 January 2008, the plaintiff was aware that D2 has relinquished its ownership of the 394 accessory car parks to D1 since 2005;

(e) whether the indefeasible title of D1 can be successfully challenged under any of the three exceptions provided for in s 340(2) of the National Land Code on the basis that D2 had failed to comply with the DO when D2 had neither been faulted by the local authority in respect of the development nor the state authority in respect of the issuance of documents of title to the 45 units of condominium incorporating 394 car parks as accessory parcels therein;

(f) whether pursuant to the DO, each condominium parcel owner is entitled to at least one car park lot?

(g) whether D2 has complied with the DO in providing sufficient car parks in the condominium for residents and for visitors?

(h) whether pursuant to the DO, D2 has provided at least 218 visitors' car parks in the condominium?

(i) whether D2's sale of 45 condominium units with 439 accessory car parks is in contravention of, inter alia:

(i) ss 24(a), (b) and/or (e) of the Contracts Act 1950;

(ii) s 4 of the Strata Titles Act 1985 which defines 'accessory parcel';

(iii) s 34(2) of the Strata Titles Act 1985;

(iv) s 69 of the Strata Titles Act 1985; and

(v) ss 20, 22(3) and/or 22(4) of the Town and Country Planning Act 1976?

(j) whether D1 and/or D2's ownership of 394 (439–45) accessory car parks as registered owner of 45 condominium units is indefeasible under s 340 of the National Land Code read together with the Strata Titles Act 1985? and

(k) whether D1 and/or D2 should account to the plaintiff in respect of all rentals collected to date and ought to pay the same to the plaintiff?

THE EVIDENCE

[29] The plaintiff called two witnesses, namely one Mr Tan Sead ('PW1') (owner of unit No 707 Block C) and Encik Anwar bin Hj Monawar (Chairman of the MC) ('PW2'). D1's sole witness was Ms Lee Bee Kee (director of D1) ('DW1'). D2 called two witnesses, namely Encik Rosly bin Ab Kadir (a registered land surveyor) ('DW2') and Datuk Hj Abdul Hanafi bin Abdullah (director of D2) ('DW3').

[30] According to PW1, he was 'given' a car park unit. He said he was promised a car park unit when he bought the condominium parcel. He said he was told that he would be given a car park when he collected the keys to his unit. He agreed that he did not buy the car park from D2. But he says that the car park 'belongs' to him. He said, the car park was given by D2 and therefore he is the owner. PW1 said that he has not seen the strata title for this unit as his previous lawyers had 'messed' up the transaction and he has asked another solicitor to handle the matter. Hence, he cannot confirm whether the car park is an accessory parcel. He said, 'ownership' of the car park was given to him by D2.

[31] PW2 was the former chairman of the residents association. Later he

A became chairman of the JMB. He is now chairman of the MC. His evidence as per his witness statement (PW2A) reads as:

> 9. Q: You mentioned earlier in Question and Answer No 3 above that after 26/9/2016, the Defendant have again started the car parking rental activities. Can you elaborate?
>
> B
>
> A: At all material times, from before Suit 58 was filed until today, there is an acute and critical shortage of visitors' carparks in Palm Spring.
>
> The Developer of Palm Spring ie Muafakat Kekal Sdn Bhd (the 2nd Defendant) never provided any information nor formal notification in respect of where are the
> C 218 visitors' carparks as required by the Development Order (Jilid 6/1).
>
> After the JMB won the Suit 58 and it was pending Appeal to the Court of Appeal, the D1 appeared to have refrained from renting out carparks but after the Court of Appeal has set aside the Judgment of Suit 58, the D1 began to assert their alleged
> D rights to rent out carparks again.
>
> However, unlike previous receipts issued under the name and chop of 'Ideal Advantage Sdn Bhd' (for examples :B_____/___], the receipts given by the Defendants now are 'blank receipt' not identifying the party who gave the receipts (kindly refer to the examples in B12/81-82).
>
> E
>
> Taking advantage of the setting aside of the Judgment in Suit 58, the D1purportedly issued a letter dated 8/11/2016 (B12/83) to allege that they wish to repaint all parcel car parks of 'Ideal Advantage Sdn Bhd' and also other related carparks. The plaintiff objected through their letter dated 21/11/2016 (B12/84) and further informed the D1that the plaintiff takes the view that the accessory car
> F parks attached to the 1st Defendant's units do not belong to them and is amongst others in breach of the Development Order ('DO') and further, the 1st Defendant's conduct in renting out the carparks are wrongful.
>
> The D1 replied to this vide the 1st Defendant's solicitors' letter dated 29/11/2016 (B12/85-86) to disagree with the plaintiff and amongst others state that the car
> G parks registered in their names belong to the D1and they have a lawful right to rent out the same.
>
> Clearly, D1 and/or D2 has no right to rent out the carparks commercially within the Condominium which is also dealing and/or using and/or intending to be used
> H separately and not in conjunction with the relevant condominium units.
>
> The plaintiff have taken photographs of the result of shortage of carparks and renting carparks in Palm Spring, where residents in cars illegally parked outside the Palm Spring Condominium and also blocking the road and causing congestion (kindly refer to the photographs taken on 23/1/2017 at about 7:00am found in
> I B12/176-177).
>
> 10. Q: What did the plaintiff do next?
>
> A: The plaintiff has no choice but to file a Court action herein to recover the 213 visitors' car parks identified by the plaintiff and also the other excessive carparks taken by the Defendants numbering 181 carparks. The summary is as follows:

— 439 carparks allocated to 45 units of Condominium registered under the plaintiffs name

— 439 less 45 (1 carpark per unit under the Development Order) = 394 carparks

— 213 visitors' carparks have been identified

— Therefore, 394 - 213 = 181 other excessive car parks

11. Q: Apart from the visitors' carparks, what is the basis for the claim for the 181 other carparks?

A: There are excessive carparks taken by D1 and illegally and wrongly used by D1 to be rented out to 3rd parties who are other residents of the Condominium. D1 is the only entity the plaintiff is aware to have taken so many units of carparks (439) causing a shortage to residents and for use of visitors. It is an illegality and/or against public policy for them to hold so many carparks and use it for an alleged purpose of commercial gain in a residential condominium. In fact, Ds caused a shortage of carparks ie a 'demand' and then proceed to make commercial profit from the same, at the expense of the residents and visitors to Condominium. Should this Honourable Court agree that these 181 carparks taken by D1 for 'rental' is wrong, it ought to be removed from the Strata Title and given to plaintiff as common property. As common property, plaintiff can use the same to allocate the car parking to alleviate the shortage of carparks for residents' use in the Condominium. Even if plaintiff is renting out carparks, this is not for personal gain but to alleviate the shortage of carparks to residents who doesn't even have a carpark (where the Developer has sold some units without carparks at all in breach of the DO which require each unit to have 1 carpark). Further, unlike D1, the proceeds for any rental collected by plaintiff is for use of the benefit of the whole condominium and not for private profits. Once these carparks are declared as common property, they are no longer attached to any parcel and can be used for the good of the community or the Condominium's owners'/residents' benefit, whenever the need arises.

12. Q: During the Injunction proceedings in this case, D2 alleged that the 213 visitors' carparks can be found in the units coloured 'pink' in B1 floor, Block G found in the plan in Exhibit 'AH-1' of the Affidavit affirmed by Dato' Haji Abdul Hanif bin Abdullah on 9/1/2017.

A: This allegation is untrue and an afterthought.

I highlight to this Honourable Court amongst others, the following:

(i) The plans are not even dated and obviously prepared recently for litigation;

(ii) If the location of these alleged visitors' car parks are true, they could have been disclosed by the Developer to the JMB and/or the management office and/or the residents more than 10 years ago or they could even have put up a Notice Board to inform everyone formally of the same;

(iii) Also, during the Trial of Suit 58,neither did D1 produce any evidence nor did D2's representative as a witness to make such allegation;

(iv) Most importantly, the same D2 who alleged these as visitors' carparks also given the carparks mainly to various residents, where some had come forward to write letters and affirm Statutory Declarations to state that these carparks belong to them and/or are given to them for their use. These letters and Statutory Declarations with attached Exhibits can be found in B12/89-155 which include the following purchasers/residents:

— Ong Huat Lim

— Lim Chia Chung

— Henry Poh King Huat

— Soo Wan Yin

— Calvin Seak Zhang Hui

— Tan Sead

— Bernard Wong Teck Cheong

— Kua Sue Chien @ Eilen

For example, in a letter dated 12/8/2016 issued by D2 to Ong Huat Lim, D2 stated that the attached carparks depicted as 'green' is belongs to Ong Huat Lim by using the phrase/sentence 'Your car park bay(s) which is depicted in green on the attached plan' [B12/95], The same car park is now claimed by D2 as a 'visitor's carpark' in Exhibit 'AH-1'.

(v) The Plan in Exhibit 'AH-1' is also now altered and changed by D2 and a slightly different plan is shown in B12/194 where the total numbers of carparks have been changed to '473' compared to the original Exhibit 'AH-1' which is '463' [B13/P1], Again, the plan in B12/194 is undated;

(vi) Further, the photographs [B12/156–175] taken in/or about 24/1/2017 on/or about 1:00am shows that the relevant carparks in B1, Block G is substantially filled with carparks ie occupied by residents and it is simply not possible for them to be visitors' carparks;

(vii) In fact, it is illogical for the carparks in Bl, Block G to be visitors' carparks as Block G is located far from some residents block in the Condominium ie Blocks A, B & C [kindly refer to the Plan in B12/197 for reference];

(viii) In fact, the perimeter carparks are the most logical carparks to be visitors' carparks and I am also present during the meeting with MBPJ which led to the letter dated 19/4/2006 from MBPJ to D1 found in B4/1617. The 239 carparks referred to in the said letter referred to perimeter carparks which D1 is supposed to demarcate but failed to do so. MBPJ directed 239 carparks because under the DO — a minimum of 2398 carparks were to be provided [2180 ie 1 each Condominium plus 10% visitors' carparks]. The perimeter carparks surround this Project and all 6 Blocks of Condominium in Block A to Block F and would be most logical and convenient for visitors to visit Blocks. It is a huge development. Each visitor visiting the relevant Block can be shown by the guards to the perimeter carparks closest to the Block the visitor is visiting.

16. Q: What are the documents found in B12/1–19?

A: Those are company searches conducted which show that as at 14/11/2016, which is about the time this Suit was filed, Lee Yek Hui (who is Lee Bee Kee's brother) is a Director in D1 and a Shareholder in D2. Lee Bee Kee is the main Director of D1. Both companies show the same registered address and Company Secretary. Both D1 and D2 are closely related. D2 is also closely related to Top Fresh which is another Company owned by D2 and 'carve out' the kindergarten in Block J.

17. Q: What about the documents found in B12/20–64?

A: Those are more recent searches done on the Strata Title of the 45 impugned condominiums with excessive carparks, which I believe can be found in the Table in paragraph 9 of the Amended Statement of Claim. From the said Table, the plaintiff also found out that the Condominium units under title numbers M2/18/599, M2/16/555, M2/16/567, M2/18/602 and M2/5/360 were transferred back to D2 and was registered back in D2's name on/or about 29/6/2012. The transfer do not change the basis of the plaintiffs claim herein as the excessive carparks still breached the Development Order and other relevant law. However, such transfer also means that apart from D1, D2 also wrongfully used the said carparks to rent out to other residents/parties.

DW1'S EVIDENCE

[32] DW1 previously testified in Suit 58 and her answers during cross-examination in that suit in respect of the 'excessive car parks' were as follows:

Q: Therefore, these car parks are given to you for free? There is not valuable consideration for them. You agree? I mean these are the facts, Ms. Lee. Do you agree with me?

A: If you said ...

Q: Yes or no?

A: Agree to your statement.

Q: So, if you have 15 car parks, it will worth RM300,000.00, am I right?

A: Yes.

(at p 385, C2)

[33] In re-examination (in Suit 58), DW1's evidence was as follows:

Q: Now, you know that when you buy the condominiums, when you buy these 45 condominiums, you have one car park given. Isn't it?

A: Yes.

Q: So how much additional car park with the developer proposed to you?

A: It is not an additional but is within the package.

Q: How many car parks? See when you buy this 45 Condominiums, these 45 condominiums come with 45 car parks, how many additional car parks with developer that agree to sell you?

A: 439 minus 45 = 394.

Q: Now, yesterday, when the Learned Counsel asked you, he actually asked you this question. These car parks were given free and no valuable consideration. Then your answer was Yes. Now do you understand this question?

A: I don't understand the word value consideration.

Q: Now I put it this way now, this car park is given free and you did not pay good money?

A: Not agree, it is within the package.

Q: Why you say there is a special arrangement? What do you mean special arrangement here?

A: I came with intention as for properties investment and I told them I wanted 41 condominiums out of it and they come out with the special package which is called special arrangement to me because the developer has told me none of the purchaser actually buy in bulk and therefore I termed it as special arrangement and the developer did come out with their package for me to tell me the price and the additional car parks that I could get and I guess this is called special arrangement.

Q: The learned counsel also asked you in several occasions in his cross examination, special relation you said no, when then special arrangement you said yes, but then special relation you said no?

A: I don't have a special relation referred to. I don't go dealing with this connection. This package was not because relationship that I get it for free. I negotiated with the company for few times and therefore we came out with the best package and it is not because due to I know the shareholder.

(at pp 421–422, C2.)

[34] DW1 is a director of D1. She became a director of D1 on 8 August 2005. Her co-directors in D1 are Lee Yek Hui and Lee Kong Meng who are her siblings. Lee Yek Hui is holding 50% shares in D1 whereas Lee Hing Lee holds 950,000 shares in D1. Lee Yek Hui also holds 34,000 shares in D2. Tunku Sulaiman Shah Ibni Sultan Abdul Aziz holds 70,001 shares in D2. A company called Gallant Acres Sdn Bhd holds 7,895,999 shares in D2. D1 and D2 have the same registered address and company secretary. The plaintiff says that D1 and D2 are closely related. And it is because of this close relationship that D2 gave away 439 car parks to D1 for free.

DW3'S EVIDENCE

[35] DW3 is a director of D2. He became a director on 19 July 2006. He said that he was previously a director of D2 and then he resigned and re-joined as a director in 2006. The relevant records of the company showed that DW3 became the director on 1 June 2004 and resigned on 24 April 2006. He re-joined as a director on 19 July 2006. He said the transaction between D1 and D2 was a commercial deal and was not a special or preferential deal. Essentially, he said that D1 made a bulk purchase and since the economy was not doing well at that time and as D2 needed to ensure that all the remaining units are sold, D2 agreed to give 439 car parks to D1 as part of the purchase transaction.

[36] I turn now to DW3's response to the plaintiffs allegations. In his witness statement (DW3A), he said:

> Q5. What do you have to say about the plaintiff's allegation that D2 has breached the DO?
>
> A. The plaintiff's allegation is without basis for the following reasons:-
>
> (a) the numbers of car park stipulated in the DO are merely for planning purposes to ensure that the number of car parks commensurate with the scale of the development based on the existing guideline or standard of town planning; basically to ensure the sufficiency of car parks.
> (*Refer to the Garis panduan Piawaian Peruntukan Tempat Letak Kenderaan bagi Kawasan Majilis Bandaraya Petaling Jaya at pages 1576-1581 of B4*)
>
> (b) However, the DO did not dictate on the ownership of the car parks or the manner car parks are to be allocated i.e. conferred with ownership, by way of 'rental', 'free for all' or 'first come first serve' basis.
>
> (c) D2 as the owner of the Master Title and developer surely has every right and freedom to develop their product (in this case the Condominium) and determine how best to market the product based on the prevailing market condition.
>
> (d) In this Project, the Condominium was marketed as such that the car park was to be sold separately from the Condominium unit. The purchasers of the Condominium were offered to purchase the car park separately at the rate of RM20,000.00 per unit to be included as an accessory parcel in their individual strata title. I am advised by our solicitors and believe that there is no law prohibiting such sale of car parks.
>
> (e) Those who did not buy the car park will sign the sale and purchase agreement for the Condominium unit only and those who buys the car park will sign an additional sale and purchase agreement for the car park.
>
> (*Refer to the Sale and Purchase Agreement for car park at pages 1618–1625 of B4*)

(f) I also want to emphasize that the DO cannot and should not dictate and/or overwrite the terms and conditions of the commercial agreement ie the sale and purchase agreement entered between any purchaser and D2.

(g) subsequently, after the issuance of the strata title for the respective Condominium unit, those unsold car parks will become the common property pursuant to the operation of law namely the Strata Title Act 1985.

(h) After the issuance of the strata title for the respective Condominium unit on 1 August 2008, D2 no longer has the rights to sell the unsold car park.

(i) Therefore it is now up the MC or the plaintiff to manage the unsold car parks as a common property.

Q6. What do you have to say about the plaintiffs allegation that the 45 Condominium units sold to D1 were allocated with excessive number of car parks and therefore the sale of the 45 Condominium units is invalid and unenforceable?

A. The plaintiffs allegation is again baseless as there is no law or provision that prevent the ownership of more than one accessory car parks for one Condominium unit.

Q7. Refer you to a letter dated 19.4.2006 from the Pengarah, Jabatan Perancangan Pembangunan at page 1617, B4, what do you have to say about this letter?

A. This letter was issued by the said Pengarah pursuant to a meeting chaired by YB Dato Hj Mohd Mokhtar B Hj Ahmad Dahlan on 23.3.2006.

I wish to clarify that the outcome of the meeting has no force of law as it was just a meeting held to address the complaint by the residents of the Condominium against D2 and during the meeting it was merely suggested for D2 to identify 239 visitor car parks.

Q8. Refer you to D2's letter dated 11.1.2005 at pages 119–120, D2's letter dated 22.8.2012 at page 149 and D2's letter dated 3.5.2013 at page 155 all in the Common Bundle of Documents (2), can you explain why these letters were issued to the Purchaser indicating the location of the car park?

A. For those purchaser who did not buy the car park from D2, the indication of the car park's location in the above letters was purely for convenience and administrative purpose. I would like to emphasize that the indication of the location did not mean that the purchaser has acquired the proprietor rights over the car park as they are not an accessory parcel.

Q9. What do you have to say to the plaintiffs allegation that the sales of 45 Condominium units between D2 and D1 had created an acute shortage of car parks at the Condominium?

A. The amount of car parks built by D2 was according and even surpassing the required numbers or standard of town planning by MBPJ. As such, it is not fair to blame D2 for the shortage of car park (if any, which is denied).

I also believe the shortage if any are superficial and/or aggravated by the plaintiff or

the resident who refused to rent from D1 and would rather park their car beside the road.

Q10. What do you have to say to the plaintiffs allegation that the transfer of the 45 Condominium units by D2 to D1 were not for any consideration and/or valuable consideration?

A. The plaintiffs allegation is totally baseless. The Car Parks were sold by D2 to D1 on the basis and understanding that D2 is the legal proprietor of the Car Parks. As such, it does not really matter to whom it sells, how it sells and at what price it sells. I understand that there is no law prohibits such sale of car parks.

Q11. Refer you to the plan at page 194, Common Bundle of Documents, can you explain why did D2 marked the 218 visitor car parks at the basement?

A. It was only marked recently pursuant to the plaintiff's application for an interim injunction.

[37] As for D2's letters to residents whereby they were allowed to 'use' the car parks and the meeting with MPPJ, DW3 said:

28.1 When D2 allowed parcel owner to 'use' car park, we did not give car park — we allowed them to 'use' car park. If does not give them right of ownership. DO does not give right of ownership. If D2 intended that car park is accessory — would it be reflected in — yes it would be in car park as accessory parcel. Those car parks which are not accessory parcel are common property to be used by all unit owners. The only exclusive car park are the ones which are 'bought' by owner — it will be accessory parcel. Did D2 try to 'mark' the visitor car park. We did mark the visitor car park.

28. 2 Although D2 is first member of MC — D2 never called for any meeting. MC used tactics to exclude D2 (...), selling multiple car park is not illegal — Nothing in the law to say 1 unit means one car park. It will go back to town planning. STA allows any amount of accessory parcel.

28.3 It is untrue that Dato Mokhtar had directed for perimeter car park to be marked as visitor car park.

28. 4 Making is for convenient. CF (11 August 2005). Accessory parcel cannot be marked as 'visitor car park' It is not common property.

28. 5 MPPJ never stated that visitor car park is to be at perimeter car park. When MC took over, they should have marked. We marked earlier — ...

[38] In seeking to rebut the plaintiffs sinister allegations, DW3 also said in his witness statement that:

D2 started the project in 2001. This was in the Sg Buloh area and it was partly jungle and sales were slow. It took about 10 years to sell. D2 has complied with all the contractual obligations — That's why he were given CF. The DO issued in 2003 — The SPA is prior to DO. The plaintiff's claim has no merit — because:

A (i) D2 as developer has complied with all requirements of DO;

(ii) Under the SPA — facilities and services are to be provided and D2 has fulfilled all these obligations.

(iii) The plaintiff is the MC. They are not involved in SPA. They do not have
B locus standi to bring us to court. We signed with the buyers.

[39] DW3 was referred to the MPPJ's letter at p 1617, B4. He said he recognised the letter and that he was at the meeting and was seated beside chairman in the meeting. He said PW2 was not at the meeting. He explained
C the genesis of the meeting. This meeting was prior to the formation of the MC. The residents had complained to MPPJ and Dato' Mokhtar brought up the issue. Puan Sharipah Marhaini bt Syed Ali (Pengarah Perancang Bandar — MPPJ) was at the meeting. According to DW3, the chairman had asked him
D whether D2 had enough car parks and he said yes.

[40] According to DW3, the chairman asked D2 to mark the car parks and he said that D2 will mark the car parks. As for the plaintiff's allegation that D2 'failed' to mark 'visitor's car park', DW3 said that there is nothing in the DO
E which states D2 has to mark the visitor's car parks. He said it is up to D2 to decide where the visitor's car park is to be located. He said the DO does not dictate that car parks are to be 'given' to the buyers. He said D2 has to follow guidelines and that they have complied with all requirements of DO. He emphasised that D2 built about 2,180 units of condominium and are required
F to provide extra 10% as visitor's car parks (2,180 plus 218 = 2,398 car parks). He said D2 is not obliged to allocate one car park for each unit. D2 spent money on car parks and have to provide car park facility. According to DW3, D2 has provided the car park facility.

G **[41]** As for the allegation that the sale of car park by D2 is illegal, DW3 said that it is not illegal. DW3 said that vacant possession was given to D1 on 30 April 2007, albeit that the purchase price had not been fully settled for the 45 units that were sold to D1. He said that the location of the 439 car parks were determined as per D2's letter dated 3 May 2010 (p 1568 B4). As at the
H date of the SPAs in June/December 2005, the location of 439 car parks had not been determined.

[42] DW3 said that there was an arrangement between D1 and D2 that as soon as the bank loans are approved, D1 is to fully settle the purchase price for
I the 45 condominium units. DW3 also said, he attended the meeting with MPPJ on 23 March 2006. The meeting was at MPPJ's office. He vehemently denied that PW2 was present at the meeting. In this regard, PW2 was recalled to the stand to testify on this point and he said that the meeting was held at the State Secretariat building in Shah Alam and not at MPPJ's office in Petaling

Jaya. He said that DW3 was not present at the meeting. A

[43] DW3 said that the convenor of the meeting, YB Dato' Hj Mohd Mokhtar bin Hj Ahmad Dahlan asked him whether there were enough car parks and he (DW3) confirmed that D2 had built more than enough car parks. He said that the meeting was merely to settle the issue of visitor's car parks and that pursuant to the meeting the visitor's car parks were all marked out. DW3 said that he has no paper trail to show that the 218 visitor's car parks were identified at the very onset and handed over to the residents association or the JMB. DW3 said that the JMB had done a coup d'etat and took over the management of the condominium and totally excluded D2 from any meetings or deliberations. He said that there was no directive from MPPJ at any time for the perimeter car parks to be designated as 'visitor's car parks'. B C

[44] According to DW3 there were and still are more than a 1,000 car parks which are not accessorised parcels and that these can easily be used as 'visitor's car parks' but the MC is adamant in wanting to use the perimeter car parks. DW3 said that the perimeter car parks have all been taken up by D1 and by another company called Top-Fresh Sdn Bhd (which is also closely associated with D2). D1 owns 439 car parks and Top-Fresh Sdn Bhd owned 44 car parks. D3 acknowledged that by virtue of the decision of the High Court in Suit No 22NCVC-567–10 of 2013 the 44 car parks are now common property which are managed by the MC. As for the car parks which were allegedly 'given' to unit owners, DW3 said that the car parks were not given but rather they were allowed to 'use' the car parks and that these car parks could be taken back by the MC at any time. DW3 acknowledged that D2's letters to the unit owners did not specify a time period for the usage of the car parks and did not state that the car parks may be taken back by the MC eventually. D E F

[45] DW3 said that the unit owners did not pay for the car parks and so their right to use the car parks cannot be exalted to 'ownership' and in any event, in as much as the car parks are not accessory parcels, they remain 'common property' and the MC is entitled to take them back and utilise them as visitor's car parks, if they so wished. G

[46] In terms of the numbers of such car parks, DW3 said that he did not have the exact numbers but he was confident that there were around 1,000 car parks which were not accessorised to any condominium units and were common property. H

[47] DW3 sought to justify the sale of 45 condominium units together with 439 car parks as accessory parcels with the following explanation. He said that the sale of 45 units to D1 together with 439 car parks was a business deal and D2 made a commercial decision to sell unsold condominium units to D1 with I

A the 439 car parks at a particular price. He said that economic situation at that time was tight and the property market was sluggish. Further, the Kota Damansara area was relatively new. And so, the take-up rate was slow. He said that although the sale to D1 meant that D1 was paying RM5,288,004 for 45 condominium units and getting 439 car parks which were worth at that time B RM8,780,000, there is nothing sinister or unusual about the sale as this was purely a commercial deal and as a developer, D1 just wanted to ensure that the condominium units were all sold.

C **[48]** DW3 said that since D1 was interested in buying 45 units, they had no issue in selling them 45 units together with 439 car parks. He added that D2 had duly complied with the DO and that MPPJ had not taken any action against D2 in respect of the DO and/or in respect of MPPJ's letter dated 19 April 2006 which was issued pursuant to the meeting held on 23 March D 2006. As for the use of 439 car parks by D1, DW3's evidence was that as the developer, D2 was not concerned as to how D1 uses the car parks or puts them to commercial use. He said once the units are sold to D1 then it is up to D1 to decide how to use the 439 car parks. It is of no concern to D2.

E **[49]** DW3 said there was no common intention on D2's part that the 439 car parks were 'given free of charge' to D1 for them to exploit commercially. He clarified that the MPPJ letter dated 19 April 2006 was not akin to MPPJ's 'instructions' or 'directive'. He said that as far as D2 was concerned, after the meeting with MPPJ on 23 March 2006, the matter was settled as D2 had F identified the visitor's car parks and it was up to the JMB (later the MC) to locate the visitor's car parks or designate the visitor's car parks from the car parks which are not accessory parcels. DW3 disagreed that pursuant to the DO, each unit owner is to be 'allocated' one car park in the sense of being 'given' and owning one unit of car park.

G

[50] During cross-examination, counsel for the plaintiff put it to DW3 that under the DO there must be 2,180 car parks and ten percent (218) for visitor's car parks. This would give a total of 2,398 car parks. To this DW3 said that D2 built more than 2,398 car parks. DW3 said that the condominium had 2,871 H car parks and as such D2 had met more than the minimum requirement under the DO. DW3 said that there is no obligation under the DO for D2 to ensure that each unit owner is 'given' one unit of car park such that the unit owner owns a car park.

I **[51]** Counsel for the plaintiff said that under the DO, D2 is obliged to either ensure that each unit has one car park or at least each unit owner is 'offered' a car park. DW3 said that there is no such obligation or requirement under the DO. He said that D2 only had to ensure that there were at least 2,180 car parks and 218 visitor's car parks. He added that the DO did not stipulate that the

visitor's car parks must be located at the perimeter of the project.

[52] I turn now to D1's position.

[53] The main plank of D1's position is that, as the registered owner of the 45 condominium units together with the 439 accessory parcels in the condominium, the strata titles have been issued. Counsel for D1 referred to the strata titles (pp 1–45, B1) which are the titles for D1's 45 units (with accessory parcels). It was argued that D1 has acquired an indefeasible title over the 45 condominium units together with the 439 accessory parcels pursuant to s 340(1) of the National Land Code. It was submitted for D1 that the allegation that D2 had failed to comply with the DO (if at all it is true) does not give any form of legal rights to the plaintiff against the accessory parcels of car parks owned by D1. According to D1, the plaintiff ought to have applied for judicial review against the land authorities that had registered D1 as the owner of the 45 condominium units and the 439 accessory parcels of car parks.

[54] In so far as the complaint that D2 did not provide sufficient car parks for the condominium, D1 says that based on the evidence, it has been proven that D2 has provided 2,871 car parks which is in excess of the amount of 2,398 car parks that D2 is required to provide under the DO and there appears to be no rebuttal by the plaintiff to the abovementioned positive assertion of D2.

[55] As for the plaintiff's complaint that D2 did not allocate one car park per unit of condominium in the project, it was submitted for D1 that during the course of the trial in Suit 58, evidence was given by the Director of the Planning Department of MPPJ, Puan Sharipah Marhaini Syed Ali (DW4 in Suit 58) that D2 had in fact complied with the DO and the guidelines issued by MPPJ and that there was no requirement to allocate one accessory parcel of car park for each condominium unit. Counsel for D1 pointed to the fact that to date even after several years since the completion of the project, there has been no indication of any proposed enforcement action by any of the authorities against D2 in respect of the alleged non-compliance of the DO. Reference was made to Puan Sharipah's evidence in Suit 58 (examination-in-chief and cross-examination) (pp 186–190, C1) which reads as:

> Q: Di sini Puan kini mengetahui bahawa terdapat satu isu 400 lebih tempat letak kereta telah diagihkan kepada satu pembeli sahaja dan soalan saya adakah ini menjadikan kelulusan perancang yang diberikan seluruh matlamat dan tujuan tersebut akan dipecah?
>
> A: Yang Arif, seperti yang saya sebutkan tadi, peranan dan kuasa saya hanya berkaitan dengan perancangan dan isu berkaitan dengan agihan saya rasa ada akta-akta lain dan pihak-pihak lain yang bertanggungjawab. Jadi, saya memohon maaf saya tidak dapat memberi ulasan dengan soal agihan sebab saya rasa itu

terdapat dalam perjanjian jual beli ada akta-akta yang berkaitan yang timbul selepas daripada perancangan.

Court: Betul, itu bidang kuasa Puan. Tetapi kadang kala apabila kita ingin meluluskan sesuatu pelan itu juga, kita kena pastikan apa yang diluluskan mematuhi peraturan-peraturan undang-undang.

A: Yang Arif, memang telah dipatuhi iaitu dari segi penyediaan mengikut garis panduan piawaian tempat letak kereta yang diluluskan oleh Majlis pada masa itu. Sebab bidang tugas saya adalah daripada segi planning sahaja. Pelan susun atur sahaja.

Q: Puan, itu adalah di tempat penyediaan pada masa kelulusan tetapi pelaksanaan kebenaran merancang tersebut jika terdapat suatu keingkaran bukankah pihak Puan mempunyai kuasa di bawah Akta Town Planning Act untuk enforcement?

Adrian:Yang Arif, we will object, jika ada. Speculative and assuming facts.

Court: No, this one is enforcement whether the witness knows about power of enforcement?

Adrian: Yang Arif, the problem is what my learned friend has done is combined the whole thing into one statement which.

Court: Dia hanya tanya soalan siapa yang in charge enforcement. Anyway she answered earlier, she is not in charge of enforcement.

A: Yang Arif, seperti yang saya nyatakan tadi, saya percaya bahawa terdapat undang-undang lain yang terpakai sebab kita dari segi perancangan, kita tak cakap berkenaan dengan agihan, penyediaan yes. Saya telah memastikan dalam pelan itu dalam pembangunan itu di tapak ada bilangan yang mencukupi.

...

A: Tetapi Yang Arif, saya sebagai pengarah perancang pada masa itu, saya telah memastikan bahawa on paper dan saya rasa perkara ini disahkan oleh bahagian perancang jabatan bangunan sebelum CF dikeluarkan, dia telah mematuhi penyediaan tempat letak kereta mengikut kebenaran merancang sebagaimana yang ditulis di pelan ini.

Q: Puan, penyediaan ini adalah juga untuk pihak resident 2180 unit, setiap orang seharusnya mempunyai satu unit, jadi jika pihak pemaju menjual 439 kepada satu pihak sahaja, ini bermakna apa yang berlaku adalah hanya tinggal 2010 untuk 2180 unit, adakah itu suatu pemecahan kepada kebenaran merancang?

Court: Just ask general question. Witness may not know what is happening.

A: Yang Arif, saya berpegang pada hanya apa yang ada pada bidang tugas saya. Saya tidak boleh membincangkan soal agihan. Saya percaya ia tertakluk kepada Akta-akta lain.

Court: Witness said many times already. She only ensure the pelan the construction of the building and car park according to plan. Distribution of car park beyond witness's control.

Justin: Very well.

Q: Puan di sini di m/s 1617, adakah surat ini dikeluarkan disebabkan terdapat satu isu pemecahan kepada kebenaran perancangan?

Court: Why don't you just ask general question? Why was this letter issued?

Q: Kenapakah surat ini dikeluarkan?

A: Yang Arif, seperti yang tertera pada surat itu, surat itu dikeluarkan atas arahan mesyuarat hasil daripada aduan penduduk di Palm Spring Damansara yang telah diadakan pada 23/3/2006. Saya menyampaikan surat ini kepada pemaju atas keputusan mesyuarat. Surat ini adalah bentuk umum.

Justin: Adakah Puan sedar di bawah Akta 27 Town and Country Planning Act terdapat kuasa untuk enforce di mana-mana development yang telah dijalankan dengan tidak mematuhi kebenaran merancang?

A: Yang Arif, seperti yang saya katakan tadi bidang kuasa dan bidang tugas saya adalah dari segi penyediaan. Sekiranya kemudahan itu telah diadakan dan disediakan, saya berpendapat kebenaran merancang itu telah dipatuhi.

Justin: No further questions.

Cross-Examination of DW4

Q: Puan, saya rujuk Puan kepada Plan Perancangan tersebut di mana bahagian keseluruhan, di bahagian maklumat di mana terdapat satu tajuk kecil yang menyatakan keseluruhan, di bawah ini dinyatakan tempat letak kereta disediakan 2827 unit tempat letak kereta disediakan sebagai 2827 unit, setuju?

A: Setuju.

Q: Bolehkah Puan memberi penjelasan apakah, bolehkah Puan mengesahkan berapakah tempat letak kereta yang disediakan?Adakah 2449 atau 2827?

A: Yang Arif, kalau kita berdasarkan apa yang dikemukakan di sini tempat letak kereta yang disediakan keseluruhan adalah 2827, saya rasa ia mengambil kita tempat letak kereta untuk perdagangan + dengan kegunaan kereta untuk perdagangan.

Q: Adakah terdapat sebarang bukti bahawa tidak ada tempat letak kereta yang mencukupi di Palm Spring?

A: Saya hanya dimaklumkan berkenaan dengan perkara ini pada mesyuarat seperti yang dinyatakan dalam buku tebal tadi. Pertama kali kami telah dimaklumkan dan satu mesyuarat telah diatur oleh ahli dewan undangan negeri berkenaan dengan isu tempat letak kereta Palm Spring.

Q: Adakah terdapat tempat letak kereta pelawat yang mencukupi di Palm Spring?

A: Pada masa kelulusan asal, ya.

[56] Thus, it was contended by counsel for D1, that D2 as the developer of the project, has in actual fact complied with the requirements of the DO. As for the complaint that D2 did not provide any visitor's car parks in the condominium it was submitted for D1 that based on the 2,861 car parks which

were provided, D2 had in fact provided sufficient visitor's car parks as well because based on the layout plan, the number of car parks to be provided for the residents is 2,180 and the number of visitor's car parks to be provided is only 218. Hence, it was submitted that to-date there are more than 218 car parks in the condominium which are not attached to any document of strata title but the plaintiff has failed and/or refused to take any form of action in respect of the same. In this regard, D1 also points to the fact that D2 had in fact identified the 218 visitor's car parks amongst the car parks which are not included in any document of strata title but the plaintiff has refused to take any action because they claim that this would upset the other owners and/or residents of the condominium.

[57] Counsel for D1 therefore submitted that even if there is non-compliance of the DO by D2, any form of non-compliance of the DO by D2 cannot by any stretch of the imagination cause any purchaser in the project including but not limited to D1, to lose their proprietary rights over the condominium units and/or accessory parcels of car parks which they had purchased.

[58] Counsel for D1 submitted that it is contrary to established legal principles for the plaintiff to be allowed to apply for and/or obtain declaratory orders which would impinge on D1's ownership of the accessory parcels of car parks and deprive D1 of its proprietary rights merely because D1 had bought a significantly greater number of car parks than any other purchaser of the condominium especially given the fact that the plaintiff has not and cannot overcome the indefeasibility of D1's registered title. As for the complaint or allegation by the plaintiff that the sale and purchase of 394 car parks by D1 is in contravention of the law, it was contended by D1 that although the plaintiff has alleged that the registration of the 394 accessory parcels of car parks in the strata titles in favour of D1 does not confer an indefeasible title to the said accessory parcels of car parks on the basis of the exceptions contained in s 340(2)(b) and (c) of the National Land Code there is in fact no basis and/or evidence to support the plaintiffs challenge to the indefeasibility of D1's title to the 394 accessory parcels of car parks.

[59] It was contended that the challenge mounted by the plaintiff with regards to the sale and purchase transaction between D1 and D2 shows that the plaintiff has failed and/or refused to take into account the parties rights to freedom of contract. It was argued for D1, that the plaintiff, being an outsider to the sale and purchase transactions between D1 and D2, does not have the requisite locus standi to challenge the sale and purchase transactions.

[60] In any event it was submitted for D1 that the plaintiff has failed to show any evidence to prove that the said sale and purchase transactions are in

contravention of the DO or any laws existing at the time the sale and purchase transactions were undertaken. A

[61] In so far as the plaintiff's complaint that D2 cannot sell more than one car park parcel to D1 for each condominium unit, it was submitted that the plaintiff's contention in this regard is without any basis and/or justification and in fact, runs contrary to the evidence of the Director of Planning of MPPJ who testified in the Suit 58. Further, it was submitted that the plaintiff's contention that D2 can only sell one unit of car park per condominium unit is not in any way provided for under any existing laws in Malaysia. On the contrary, it was contended on behalf of D1 that D2 as the owner of the land on which the condominium is built has the right to sell any part of the land to any person and/or corporation provided such sale does not contravene the DO. B C

[62] As for the plaintiffs contention that D1 should not be allowed to purchase more than one car park per condominium unit, it was argued for D1 that this is contrary to the laws existing in Malaysia and would severely curtail the right of the developers in respect of their dealings with their land and purchasers in respect of the rights to purchase more than one car park in any condominium project in Malaysia despite there being no impediment imposed by any existing laws. D E

[63] As such, it was submitted that quite apart from there being no law governing the number of accessory parcels of car parks that can be sold to the purchaser of one unit of condominium, the plaintiff has also failed to give any substantiation and/or cogent basis to support their contention that D2 as the developer can only sell one accessory parcel of car park with one condominium unit. Further such a contention which although may appear to be environmentally friendly does not conform to the norms of people who live in condominium developments. Counsel for D1 went on to submit that the average condominium dweller these days tends to have at least two cars ie one for the husband and one for the wife. F G

[64] On the issue of critical shortage of car parks, it was submitted by counsel for D1 that the critical shortage of car parks in the condominium is an event that happened many years after the completion of the project and the handing over of vacant possession. H

[65] However, the plaintiff has not identified whether there is a critical shortage of car parks for the residents or for the visitors but instead appears to lay the blame of the critical shortage of the car parks at the feet of D1 on account of D1 having bought 439 accessory parcels of car parks which according to D1 is legally permissible and sanctioned by the authorities by virtue of the registration of the strata titles in favour of D1. I

[66] Counsel pointed out that in their haste to lay the blame on D1 and/or D2, the plaintiff has completely forgotten that D2 as the developer has in actual fact shown that they have complied with the requirements of the DO in constructing the requisite number of car parks including the visitor's car parks that are required to be constructed pursuant to the DO as approved by MPPJ. Counsel for D1 points to the fact that the Director of the Planning Department of MPPJ in her evidence given during the course of the trial in Suit 58 had alluded to the fact that D2 as the developer of the condominium had in actual fact complied with the DO by constructing more than the requisite number of car parks ie 2,398 car parks. As such, it was submitted that D1's purchase of the 439 accessory parcels of car parks could not in any way be said to have caused any critical shortage of car parks in the condominium.

[67] Counsel says that based on simple calculations, even after the deduction of the 439 accessory parcels of car parks from the total number of 2,871 car parks there would be 2,422 car parks left which is more than the 2,398 car parks that D2 as the developer of the condominium is supposed to provide for the project. As such the plaintiffs assertion that there is a critical shortage of car parks because D1 has purchased 439 accessory parcels of car parks together with the 45 units of condominium that D1 has purchased, is completely unsustainable and without any basis.

[68] It was also argued for D1 that the so called critical shortage of car parks was not caused by D1's purchase of the 439 accessory parcels of car parks which have been rented out and that if at all there is any critical shortage of car parks, it is because the residents living in the condominium have too many cars for which even 2,861 car parks are not sufficient to accommodate all of the cars parked by the residents of the condominium in the perimeter of the project. Hence, counsel for D1 submitted that it would be inequitable for this court to even consider depriving D1 of its proprietary rights over the 439 accessory parcels of car parks just because the other residents and/or owners had failed, refused and/or neglected to purchase sufficient car parks within the project to accommodate the number of cars that they have in their household.

[69] As for the plaintiff's contention that 213 out of the 439 accessory parcels of car parks which are owned and have been registered in favour of D1, are in actual fact visitor's car parks and therefore would constitute common property which ought to be controlled and managed by the plaintiff, D1's response is that the plaintiff has failed to produce any evidence to support its contention that 213 out of the 439 accessory parcels of car parks are in actual fact common property.

[70] It was submitted for D1 that the 439 accessory parcels of car parks in the condominium registered in favour of D1 would not constitute common

property based on the definition provided in s 4 of the Strata Titles Act 1985 (Act 318) which defines common properties as follows:

> ... 'Common property', means so much of the lot as is not comprised in any parcel (including any accessory parcel), or any provisional block as shown in an approved strata plan ...

[71] Counsel for D1 referred to the case of *Perbadanan Pengurusan Apartment Sea Park Blok & Ors v SEA Housing Corporation Sdn Bhd & Ors* [2016] MLJU 942 where Rozana Ali Yusoff JC discussed the concept of common property and held as follows:

> ... In fact *Section 4STA* defines common property as 'means so much of the lot as is not comprised in any parcel (including any accessory parcel), or any provisional block as shown in a certified strata plan' ...

[72] The next case that was referred to was *Plaza Pekeliling Management Corporation v IGB Corporation Berhad & Anor* [2003] MLJU 216 where Hj Abdul Malik bin Hj Ishak J (as he then was) described common property as follows:

> ... Put it in a simpler language, 'common property' means that there is no title to it. If there is title, then it is not a 'common property'. Seen in that perspective, enclosure one (1) of the present originating summons must fail in limine ...

[73] Hence, it was submitted for D1 that once the title is issued and exists for all the 439 accessory car park parcels in the condominium, then the accessory car park parcels are no longer considered as common property. It was emphasised that the plaintiff has failed to challenge the issue of the title by way of any form of judicial review proceedings against the relevant authorities that issued the strata titles. D1 also relies on cl 27(b) of the said SPAs between D1 and D2, which states that:

> ... 'common property' means so much of the land as is not comprised in any parcel or any provisional blocks ...

[74] In addition to this, the third schedule attached to the respective 45 SPAs clearly list the common facilities and services and car parks are not at all mentioned as being part of common facilities.

[75] In the result, it was contended on behalf of D1 that the 213 out of 439 accessory car park parcels cannot be regarded as common properties because all the 213 accessory car park parcels as claimed by the plaintiff were attached with the main parcel units with separate document of titles and D1 has rightly purchased the 213 accessory car park parcels together with the other 226

accessory parcels (213 accessory parcels + 226 accessory parcels = 439 accessory parcels).

[76] In support of this argument, counsel for D1 referred to the decision of Justice Lim Chong Fong in the case of *Saluran Projek Sdn Bhd & Anor v Badan Pengurusan Bersama Krystal Point* [2016] 1 LNS 728. In that case, the JMB filed an action to recover the car parking bays against Saluran Projek Sdn Bhd and Modern System Parking Sdn Bhd on the ground that the car parking bays are common properties. However, one of the Saluran Projek's contentions was that the car parking bays are not common property and JMB is not entitled to the car parks which were sold by Saluran Projek to Modern System Parking Sdn Bhd. After having perused through SPAs in particular cl 33 which, inter alia, provides that the car parking bays shall at all times remain the property of the vendor ie Saluran Projek Sdn Bhd, the court held as follows:

> ... 40. From the literal reading of both the aforesaid clauses, it is plain that the car parking bays belonged to the developer, to wit: Saluran Projek. It follows that it could neither belong to the purchasers nor be treated as common property as well.

[77] Consequently, based on the case *Saluran Projek Sdn Bhd & Anor v Badan Pengurusan Bersama Krystal Point,* counsel for D1 submitted that cl 27(b) and Third Schedule of SPAs between D1 and D2 clearly provides that the car parks are not intended to be common property.

[78] Counsel pointed to the fact that in the case of *Saluran Projek Sdn Bhd & Anor v Badan Pengurusan Bersama Krystal Point,* Justice Lim Chong Fong decided that the car parking bays are not common property because the JMB did not provide a certified strata plan to show that the car parking bays were neither parcel nor accessory parcel. But counsel said that in the present case, all the 439 accessory car parks parcels owned by D1 are included as a separate individual parcel. Therefore, there is all the more reason to conclude that the 439 accessory car parks parcel are not common property.

[79] The next point that was dealt with pertains to the conduct of D1 in dealing with car parks separately from the condominium units. Here the plaintiffs allegation is that D1 has dealt with the main parcel and the accessory parcel separately mainly because D1 rented out the car parks to other residents and/or owners of the condominium. The plaintiff's alleges that this is in breach of ss 34(2) and 69 of the Strata Titles Act 1985.

[80] However, counsel for D1 took the position that there is no breach of ss 34(2) and 69 of the Strata Titles Act 1985 (Act 318) because the renting out of the car parks units to the third parties does not constitute 'dealing' with the accessory parcels of car parks separately from the condominium units because

dealing in the context of the National Land Code means 'registrable dealings'. A

[81] And it was therefore submitted for D1 that the renting of D1's car parks does not constitute a registrable dealing under the National Land Code and therefore does contravene ss 34(2) and/or 69 of the Strata Titles Act 1985. But, counsel for the plaintiff argued that renting of car parks is a form of tenancy and falls within the definition of 'dealt with' and 'dealing'. Having traced the historical issues, the problem, the dispute, the evidence and the arguments, I turn now to my analysis and conclusion. B

ANALYSIS AND CONCLUSION C

[82] The crux of the problem in the present context is the undisputed fact that D1 and D2 entered into 41 SPAs respectively dated 7 December 2005 and four SPAs respectively dated 27 June 2005 by which D2 agreed to sell 45 units of condominium to D1 together with 439 accessory parcels of car parks. D

[83] According to the plaintiff these transactions by which D1 obtained 439 accessory parcels of car park are illegal as they are in breach of the DO and in contravention of ss 34(2) and 69 of the Strata Titles Act 1985. Further, it is contended that they were not transferred or sold with any consideration and/or valuable consideration and the transfer/sale is against public policy. As such, it was argued that the registration of the 394 car parks in the strata title is void ab initio and ought be cancelled/set aside under, inter alia, s 340(2)(b) and (c) of the National Land Code read together with s 5 of the Strata Titles Act 1985. E F

[84] The plaintiff's stand is that D1 are only entitled to the use of 45 car parks on the basis of one car park per unit of condominium. As for the other 394 car parks (which apparently includes the 213 visitor's car parks) it is alleged that they cannot validly belong to D1 because they are being used or dealt with separately from the condominium units in contravention of the law, namely s 4 which defines 'accessory parcel' and ss 34(2) and 69 of the Strata Titles Act 1985. The plaintiff has alleged that D1 and D2 have caused a critical demand of car parks which was artificially 'created' by D2 selling excessive car parks to D1, which were meant for residents and visitors. It is alleged that D1/D2 are obtaining profits from the commercial business of 'renting' the car parks within the project which is a residential condominium. G H

[85] According to the plaintiff, in order to resolve the acute shortage of car parks in the condominium, a meeting was held on 23 March 2006 and chaired by YB Dato' Hj Mohd Mokhtar bin Hj Ahmad Dahlan. At the meeting, a resolution was reached and MPPJ subsequently issued a letter dated 19 April 2006 (p 1617, B4) by which D2 was directed to mark out 239 car park parcels in the condominium. PW2 said that at the meeting, MPPJ had stated that I

there should be 239 perimeter car parks which will be used as visitor's car parks. According to the plaintiff, D2 ignored the direction by MPPJ.

[86] As a result of the meeting, out of the 239 uncovered car park parcels, 213 parcels were identified as the condominium's perimeter parking which are part of the 439 car parks that were allocated to the 45 condominium units of D1/D2. But D2 apparently failed to mark out the visitor's car park in the perimeter car park. In this regard, neither side was able to produce the minutes of meeting held on 23 March 2006. Also, DW3 claimed that he was at the meeting. But, PW1 said DW3 was not at the meeting. And DW3 said PW1 was not at the meeting. DW3 said the meeting was held at MPPJ office whereas PW2 said the meeting was held at the State Secretariat Office in Shah Alam. It is of course difficult to say whether PW2 or DW3 were telling the truth as to their presence at the meeting and the venue of the meeting.

[87] But, having heard and seen PW2 giving evidence, I have no reason to disbelief him when he said that what was discussed at the meeting with MPPJ was 'perimeter car park' which were to be used as visitor's car parks. But DW3 said that he attended the meeting and sat next to the chairperson. He said that there was no directive for perimeter car parks to be marked out as 'visitor's car parks'. At any rate, DW3 said that visitor's car parks were marked out but these markings have worn out. Other than the letter dated 19 April 2006, both sides could not provide any other paper trail in relation to the meeting that was convened by MPPJ.

[88] In particular, there was no evidence that the perimeter car parks or any other location was marked out as visitor's car parks. But as PW2 said, there was a directive by MPPJ for visitor's car parks to be marked out. As I said, I have no reason to disbelieve PW2. If as DW3 claims, the visitor's car parks were marked out, then there would some evidence of it. But none was produced before this court. It is therefore more likely than not that D2 did not mark out the visitor's car parks.

[89] The plaintiff alleges that to date D2 failed and/or neglected and/or has refused to acknowledge that these perimeter car parks ought to be the visitor's car parks under the said DO. Previously the JMB filed a counterclaim in Suit 58 in respect of the 394 car parks.

[90] In Suit 58, the JMB won the case after a full trial in respect of the 394 car parks (including the 213 visitor's car parks) see: *Ideal Advantage Sdn Bhd v Palm Spring Joint Management Body & Anor* [2014] 7 MLJ 812; [2014] 1 AMR 49. However, the JMB's victory was short-lived as the judgment of the High Court was set aside by the Court of Appeal on 26 September 2016, not on merits but on the basis that in an entirely separate proceeding, the JMB had

been ruled as being void ab initio with the coming into existence of the plaintiff. Hence the High Court judgment in Suit 58 was set aside purely on a technicality, that is, on the basis that the IMB lacked locus standi.

[91] As far as D1 is concerned, the position that they take is that their names are already on the strata titles as registered owners and collectively they have 439 car parks as accessory parcels to the 45 condominium units. There is no denial by D1 that they are renting out the car parks and that these car parks are being utilised for commercial purposes to generate a substantial income.

[92] It was submitted for D1 that as the registered owner of the 45 condominium units together with the 439 accessory parcels in the condominium, they have acquired an indefeasible title over the 45 condominium units together with the 439 accessory parcels pursuant to s 340(1) of the National Land Code.

[93] D1 also contends that there is no breach of ss 34(2) and 69 of the Strata Titles Act 1985 (Act 318) because the renting out of the car parks units to the third parties does not constitute dealing with the accessory parcels of car parks separately from the condominium units because dealing in the context of the National Land Code means registrable dealings. Thus D1 maintains that the renting of D1's car parks does not constitute a registrable dealing under the National Land Code and therefore would not be in contravention of ss 34(2) and/or 69 of the Strata Titles Act 1985. However, according to the plaintiff, D1 and D2 are not entitled to transact in what ought to be common property and formally designated as such in the DO as visitor's car parks. It was emphasised that the registration of title in the name of D1 cannot prevent the plaintiff from recovering such visitor's car parks and in this regard, counsel for the plaintiff cited the case of *Perbadanan Pengurusan Palm Spring @ Damansara v Muafakat Kekal Sdn Bhd & Ors (No 2)* [2015] MLJU 279; [2015] 5 MLRH 426 at p 439 (involving the same parties) where the court held:

> [56] I therefore find that 'Kemudahan Umum' as listed in the DO is 'common property'. The fact that 'taska' was carved out, deliberately or otherwise, from the SPA entered into between D1 and D2 does not mean that Block J is excluded from the common properties of the condo because the DO clearly provides for Block J as part and parcel of the 'Kemudahan Umum Yang Disediakan'. And as confirmed by PW2, D1 must comply with the DO as it was duly approved pursuant to law, ie the Town and Country Planning Act 1976.

[94] It was pointed out that *Perbadanan Pengurusan v Muafakat*'s case involves the same project where the same developer, Muafakat Kekal Sdn Bhd ('D2') managed to 'carve' out Block J of the project which was designated as a 'kindergarten' in the DO, as a separate title which was then sold to Top Fresh Foods (M) Sdn Bhd ('Top Fresh') (a company which is related to or close to

D2) together with 44 accessory car parks and these were wrongfully registered in Top Fresh's name. In that case, the court set aside the registration and ordered the return of Block J and the 44 car parks to the plaintiff.

[95] According to the plaintiff, D2 is presently unable to credibly show the 213 visitor's car parks at all. It is now many years after purchasers/residents have taken possession of the condominium units, and yet the 213 visitor's car parks have not even been designated. The plaintiff maintains that logically, the 213 visitor's car parks would or should have been handed over to the management at the time vacant possession was given to the purchasers. But D2 has alleged that the 218 visitor's car parks can be found in B1 Floor of Block G (p 194, B12).

[96] To this, the plaintiff says that it is belated and is an afterthought by D2. At any rate, the plaintiff had shown examples of contemporaneous documents issued by D2 to residents and there are letters and statutory declarations by the residents which show that these 218 car parks had been given to the residents for their exclusive use. These residents are now claiming that the car parks belong to them and/or they have rights to the said car parks. The plaintiff therefore alleges that there are no visitor's car parks because car parks have been improperly 'sold' by D2 to D1. As far as the plaintiff is concerned, despite D2 making a bare allegation that purportedly 2,861 car parks were built, yet D2 is unable to credibly show the location of 218 units of visitor's car parks free of any encumbrances/claims. This therefore leads the plaintiff to complain that these 218 visitor's car parks were part of the car parks which were improperly sold to D1.

[97] The plaintiff is not aware of any other party who has been given such an exorbitant number or car parks (439) by D2, the developer. It was emphasised that whilst the plaintiff is making a claim based on public and the residents' interests, D1's concern is only on 'profit' from the rental of car parks. It is therefore relevant to ask, what was D1's intention behind the allocation of 439 car parks as accessory parcels? Here, the evidence of DW1 (Lee Bee Kee) in Suit 58 is highly significant. She said:

> Q: So your concern was the best pricing or your concern was the 400 over car parks?
>
> A: *I refer to condominium or property investment that I am in charge of the company. So long that is profitable to the Company. That is my interest. So whichever that they can sell to me or they think that they can sell to me then, we negotiated. It is not oh I come here to purchase your car park. No.*
>
> Q: Now, *your intention to have so many car parks is to do the rental car park business right?*
>
> A: *Yes.*

[98] The substance of DW1's evidence was that D1 did not invest in the project to buy car parks but rather that they got a very good deal and that since they had 439 car parks, they decided that they would commercially exploit the car parks by renting them out. To my mind, to accept DWl's evidence that they merely got a 'good deal' is to ignore the reality and would be putting a premium on the court's credulity. Hence, it is quite unfathomable to accept that the 439 car parks was just part of a commercial deal between D2 and D1.

[99] DW1 said D1 got a good deal and DW3 supported this by saying that D1 made a bulk purchase and so D2 was prepared to let them have 439 car parks. DW1 said that she was a 'walk in' customer and she was referred to one Emily (who was not called as a witness). DW1 said that she negotiated with Emily and struck a bargain. DW3 said that Emily was a sales manager and that she had authority to negotiate such sales.

[100] DW3 said that for a major bulk sale of 45 units to D1 , Emily would have brought it to the attention of the directors of D2 and that at that time, D2 was only interested in selling off the unsold units and that the 439 car parks was part of the commercial deal. DW3 denied that the sale of 45 units to D1 was to appease the shareholder of D2, one Lee Yek Hui, whose sister is DW1, a director of D1. DW3 said that although D1 and D2 share the same registered address, they were located in different parts of the complex.

[101] The main trust of the plaintiffs attack on the illegality aspect of the 439 car parks is predicated on the use of those car parks for commercial exploitation and were therefore not used as an accessory parcel. This neatly takes us to s 4 of the Strata Titles Act 1985, where an 'accessory parcel' is defined as:

> 4 Interpretation
>
> In this Act, unless the context otherwise requires —
>
> 'accessory parcel' means any parcel shown in a strata plan as an accessory parcel *which is used or intended to be used in conjunction with a parcel;* (Emphasis added.)

[102] As for the rights of the unit owners vis a vis in his parcel, common property and accessory parcel, it is relevant to refer to s 34 of the Strata Titles Act 1985 which reads as:

> 34 Rights of proprietor in his parcel and common property
>
> (1) Subject to this section and other provisions of this Act, a proprietor shall have —
>
> (a) in relation to his parcel (in the case of a parcel proprietor), the powers conferred by the National Land Code on a proprietor in relation to his land; and

A (b) in relation to the common property, the right of user which he would have if he and the other proprietors were co-proprietors thereof.

(2) *No rights in an accessory parcel shall be dealt with or disposed of independently of the parcel to which such accessory parcel has been made appurtenant*.

B (3) No rights in the common property shall be disposed of by a proprietor except as rights appurtenant to a parcel; and any disposition of a parcel by a proprietor shall without express reference include a like disposition of the rights in the common property which are appurtenant to the parcel.

(4) A proprietor is not allowed to apply for any amendment of the express C conditions on his documents of strata title. (Emphasis added.)

[103] Next, s 69 of the Strata Titles Act 1985 provides that there shall be no dealing with an accessory parcel in such a manner to be independent of the D main parcel. It reads as:

69 No dealing in accessory parcel independent of a parcel

No accessory parcel or any share or interests therein *shall be dealt with independently of the parcel* to which such accessory parcel has been made appurtenant as shown on E the approved strata plan. (Emphasis added.)

[104] I turn now to Suit 58 involving the JMB and D1 ie the decision of the High Court in *Ideal Advantage Sdn Bhd v Palm Spring Joint Management Body & Anor* [2014] 7 MLJ 812; [2014] 1 AMR 49; [2014] 1 CLJ 598 (HC). As F I said earlier, the judgment in Suit 58 was set aside on the locus standi issue and not on its merits. The grounds of judgment of the learned judicial commissioner are still relevant for present purposes. For my part, I have referred to those parts of the judgment which touch upon the issues which are now before me. The reasoning of the judicial commissioner on the issues are in G my view relevant, although not binding on this court. The following parts of the judgment merit reproduction in full:

Reconciliation of ss 4, 34(2) and 69 of Act 318

[47] The salient provisions of Act 318 would have to be reconciled in order to H ascertain the true intent and purpose of the Act. These provisions are as follows:

(a) *Section 4* of Act 318 states:

'accessory parcel' means any parcel shown in a strata plan as an accessory parcel which is used or intended to be used in conjunction with a parcel. (Emphasis added.)

I (b) Section 34(2) of Act 318 states:

No rights in an accessory parcel shall be dealt with or disposed of independently of the parcel to which such accessory parcel has been made appurtenant. (Emphasis added.)

(c) *Section 69* of Act 318 provides as follows:

No accessory parcel or any share or interests therein shall be dealt with independently of the parcel to which such accessory parcel has been made appurtenant as shown on the approved strata plan. (Emphasis added.)

[48] From the reading of the above provisions of Act 318, it would appear that for the purpose of Act 318, the accessory car park parcels which are attached to the respective condominium units and/or main parcels shall only be used or intended to be used together with the main parcels and these accessory car park parcels shall not be dealt with 'independently' or 'separately' from the main parcels.

[49] One has to look at the plain, simple and ordinary meaning of the salient words in the relevant provisions of Act 318, quoted above in order to understand the true intent and spirit of law.

(a) The word accessory had been defined by *Concise Oxford English Dictionary* (11th Ed) to mean:

a thing which can be added to something else in order to make it more useful, versatile, or attractive.

(b) The *New Shorter Oxford English Dictionary*, Vol 1A–M, edited by Lesley Brown defines 'accessory' to mean:

'An additional or subordinate thing; an adjunct, an accompaniment;'

(Note: From the clear definition of the words 'accessory parcel' given by s 4 of Act 318, it is obvious that Act 318 envisages that the accessory car park parcel which is shown in the strata plan as an accessory parcel attached to the main parcel must be used or intended to be used in conjunction with the said main parcel to which it is attached to or appurtenant to.)

(c) The *Concise Oxford English Dictionary* (11th Ed) edited by Catherine Soanes and Angus Stevenson defines the word conjunction to mean an instance of two or more events occurring at the same point in time or space and the words in conjunction was defined to mean together. Hence the phrase in conjunction with the main parcel used in the said definition section illustrate that the accessory car park parcel assigned to the condominium units purchased by the plaintiff, in this case the 439 parcels car park parcels must mean that these accessory car park parcels must be used concurrently or at the same time or together with the use of the 45 units of condominiums purchased by the plaintiff.

(d) The word *appurtenant* used in the sections that I have quoted above had been defined by *Black's Law Dictionary* (7th Ed) by Bryan A Garner to mean *Annexed to a more important thing and appurtenance* means *Something that belongs or is attached to something else (the garden is an appurtenance to the land).*

(e) *Stroud's Judicial Dictionaiy of Words and Phrases* (6th Ed) Vol 1: A–F states that *appurtenant means annexed to or inseparably connected with.*

(f) *The Dictionary of English Law* by Earl Jowitt by Sweet & Maxwell describes *Appendant and appurtenant as These words are used to describe a hereditament which is annexed to another hereditament, the latter hereditament being the principal hereditament and the hereditament which is annexed thereto being the adjunct or accessory.*

(g) Jowitt went to say Once a thing appendant has been separated from the principal so as to be held in gross, or independantly, it can never become appendant again.

(h) *Appurtenant* had also been defined by Jowitt to mean ... *'pertaining or belonging to'*.

[50] From the above definitions of the words used in s 4 of Act 318, an accessory parcel is a parcel that is annexed, attached, connected, dependant on and/or used or intended to be used with the main parcel. The word *accessory* means a thing that can be added to something else in order to make it more useful, versatile or attractive. It also means an attachment, addition, added-on, adjunct, appendage and appurtenance.

[51] The Court of Appeal of Singapore had the opportunity to deal with the meaning of the words 'accessory lot' which are found in ss 9(5) and 30(1) of the Singapore Land Titles (Strata) Act (Cap 158) in *Abraham Aaron Issac v Management Corporation Strata Title Plan No 664* [1999] 3 SLR 81 at p 88. The said court held that *an accessory lot has to be used in conjunction with the lot to which it is attached to or appurtenant*. The court states as follows:

> An accessory lot as its name connotes, does not exist on its own and cannot be dealt with independently of the lot to which it is appurtenant.

[52] This argument is further strengthened by the words stipulated in s 34(2) of Act 318 which state that no rights in an accessory parcel shall be dealt with or disposed of independently of the main parcel. *I am of the view that the word dealt with is wide enough to encompass the act of renting of the said accessory car park parcel to tenants who are not occupants of the 45 condominium units owned by the plaintiff as was done in this case.*

[53] Having evaluated the evidence of the plaintiffs witnesses especially PW1, I am satisfied that at the outset the *purpose of the plaintiff to acquire 439 accessory car park parcels together with the 45 condominium units was to commence a car park rental business in Palm Spring Condominium.* PW1 had admitted that even a condominium unit which the plaintiff purchased from MKSB with one bedroom and one study room and with only 1000 sqft, it was allocated with thirteen accessory car park parcels (see p 12 of the notes of proceedings). During cross-examination by learned counsel for the defendants, PW1 admitted that the extra accessory car park parcels were to be rented to different people who occupy Palm Spring Condominium including those residents who occupy condominium units other than the 40 units owned by the plaintiff. The receipts which were produced in the court further strengthened the fact that these accessory car park parcels were meant for rental at RM120 per month to the residents of the Palm Spring Condominium other than the tenants of the plaintiff ('D2', 'D3' and 'D6'). Despite being evasive in her answers pertaining to the substantial amount of rentals

collected by the plaintiff, PW1 could not suppress the information that a substantial amount of rentals had been collected by the plaintiff from these accessory car park parcels. In the course of the trial, this court was informed that a substantial sum of rentals collected by the plaintiff was placed in the custody of the plaintiffs solicitor as a stakeholder pending the disposal of this action. Both PW1 and PW2 had also admitted that there were not sufficient car parks for the residents and visitors of Palm Spring Condominium.

[54] From the evidence that was adduced during the four day trial it could not be disputed that *the whole purpose for the plaintiff to acquire the 439 accessory car park parcels together with 45 units of condominium was to run a car park business at Palm Spring Condominium.* It was also not disputed that for each of the condominium unit which is about 1000 sqft at most would require one or two car parks. Obviously the remaining car parks attached to that particular unit were meant for the plaintiffs car parks rental business. The same explanation would apply to the rest of the condominium units purchased by the plaintiff. *It is obvious that these accessory car park parcels were used separately from the main parcel. The renting of these accessory car park parcels to persons other that the tenant of the specific unit and/or the renting of the accessory car park parcels in itself amount to 'using', 'intending to use', and 'dealing' with the accessory parcel 'separately' or 'independently' from the main parcel.*

[55] It is also in evidence that each of the condominium unit which the plaintiff purchased is about 1000 sqft. Therefore it is not justified for the plaintiff to own between eight to 15 accessory parcels for such a small unit. The most it needed is only one or at most two. Hence it is obvious that the rest of the accessory car park parcels which are attached to the said unit were to be used separately from the main parcel and/or as testified by PW1 to be rented to other residents who are not tenants of the 45 condominium units owned by the plaintiff. The plaintiff had every intention at the outset to 'using', 'intending to use' and 'dealing' with the accessory parcels 'separately' or 'independently' from the main parcels. Hence the plaintiffs action to rent out these accessory car park parcels separately or independently from the main parcel is not to use the said accessory car park parcels in conjunction with the main parcels as envisaged by Act 318.

[56] The Hansard of the Parliamentary debates in the Senate during the tabling of Act 318 on 22 April 1985 (see Tag 26 of 'SD (F)2') further strengthen and support the contention that the accessory car park parcels must be used and/or intended to be used in conjunction with the main parcels to which these accessory car park parcels are attached, annexed and/or appended to. The language of the Hansard were in the following words:

> Petak Aksesori adalah istilah yang digunakan bagi petak-petak yang digunakan bersama-sama dengan petak yang didiami tetapi terletak di luar petak berkenaan ataupun di luar dari bangiman berkenaan, seperti tempat letak kereta.

[57] *The word 'dealt' used in ss 34(2) and 69 of Act 318 would include the act of 'renting out' or 'tenanting out' of these accessory car park parcels. Therefore the plaintiff in this case is prohibited by Act 318 to rent out the accessory car park parcels separately or independently from the main parcels. This interpretation is also in harmony with the reading of the words in Section 4 of Act 318 which defines 'accessory parcel' to mean 'an accessory parcel which is used or intended to be used in conjunction with a parcel'. The*

words used and/or intended to be used would also include the renting out of the accessory car park parcels separately from the main parcels to other residents but not for the use or intended use of the tenants and/or occupants of the main parcels. The 'harmonious interpretation' of the various provisions highlighted above would show that the renting out of the accessory car park parcels by the plaintiff as was done in this case was in contravention of Act 318 as the plaintiff is prohibited by Act 318 to deal with the accessory parcels separately or independently from the main parcel.

Breach of development order

[58] The claim of 'ownership' of the 439 accessory parcels by the plaintiff is illegal and in breach of Act 318. If the relevant provisions of Act 318 were to be examined, it is obvious that it was not the intent and purpose of the said Act 318 for the accessory parcels to be transferred in bulk in the manner that was done in this case. These 439 accessory parcels were attached to the 45 units of condominiums and/or main parcels purchased by the plaintiff from MKSB. It would appear that the sale of these accessory parcels would contravene the Town and Country Planning Act 1976. As the developer, MKSB had breached the conditions of the development order and Act 318.

[59] The purpose of the sale and purchase of the 439 units of accessory car park parcels not only defeated the intent and spirit of Act 318 but also the Town and Country Planning Act 1976. MKSB had breached the condition of the development order dated 9 October 2003 made under ss 22(3) and 22(4) of the Town and Country Planning Act 1976. Thus the 10% of the 2180 car parks that MKSB had to provide was part of the conditions of the development order applicable to Palm Spring Condominium which MKSB must comply with. By dealing with the car parks which were meant for visitors' car parks and/or which were meant to be 'common property' as defined in s 2 of the Building and Common Property (Maintenance and Management) Act 2007, MKSB had breached the mandatory conditions stipulated in the development order dated 9 October 2003. (Emphasis added.) (at pp 68–73)

PRELIMINARIES

[105] I will come back to the reasoning of the judicial commissioner as per her judgment in Suit 58 shortly. For now, it may stated that the plaintiffs claim vis a vis the 394 car parks (inclusive of the 218 visitor's car parks), is in pith and substance for recovery of ownership of car parks as 'common property'.

[106] The claim pertains to the 'excessive' car parks and includes, the ever elusive 218 visitor's car parks. In so far as the issue of locus standi is concerned, based on the resolution signed by all Council Members of the MC which authorised the filing of this suit (pp 87–88, B12) and s 143(2) and (3) of the Strata Management Act 2013 (encapsulating formerly s 76(1) of the Strata Titles Act 1985) the plaintiff can lawfully sue for recovery of common property. As for limitation, I am of the view that car parks are an integral part of land and the limitation period applicable here is 12 years. In any case, pursuant to s 79

of the Strata Titles Act 1985, the Limitation Act 1953 do not extend to claims relating to common property.

THE DEVELOPMENT ORDER

[107] I turn now to the DO. The director of the planning department of MPPJ testified in Suit 58 that D2 has complied with the DO. She said that the question of allocation of one car park per unit is not within her purview. She said that on paper there were enough car parks and that the adequacy of car parks (per the DO) once the project has been completed would have been verified by the department before the CF was issued. And so the question is — was there a breach of the DO by the developer (D2) in not 'allocating' one car park per unit. And allocating here means 'giving' one car park to the owner of a unit.

[108] In this regard, I agree with the submission by counsel for D1 and D2 that the DO cannot override contractual obligations and agreements reached between parties, so long as the contract or the consideration for the contract or the object is not illegal (s 24 of the Contracts Act 1950). The endorsement on the DO that there should be one car park per unit means that the developer has to ensure that in terms of numbers that there are at least one car park per dwelling unit. Here there were 2,180 units. Hence there must be at least 2,180 car parks. I will refer to this as 'the minimum car parks'.

[109] From the evidence, it is quite clear that there were more than 2,180 car parks. And D2 was also obliged per the DO to provide 10% of the minimum car parks or 218 car parks as 'visitor's car parks'. In terms of the numbers, I am in no doubt that MPPJ would have satisfied themselves that D2 had provided the minimum car parks and the visitor's car parks, but I emphasise that this is only in terms of the numbers. I will come to 'usage' and the issue of 'allocation' of car parks shortly. It was argued for the plaintiff that D2 should have allocated one car park to each unit owner. But the unit owners are not parties to this suit and it was not pleaded or argued that the plaintiff was suing for and on behalf of the unit owners so that the car parks would now be allocated to them.

[110] It is clear from the pleadings and the way the case was conducted that the plaintiff was seeking to impugn the sale or transfer of 439 car parks to D1 (*save for 45 car parks which the plaintiff say D1 is entitled to*) and to treat these car parks as 'common property'. To close off on this point, it is my finding that there is no legal or factual basis for the plaintiff's suggestion that under the DO, each unit owner is to be allocated ie given one car park. The word 'allocated' has no place in this discussion, as the car park is either an 'accessory parcel' or 'common property'. Presently, the 439 car parks are accessory parcels to the 45 units which were sold by D2 to D1.

[111] As such D1 claims that their title to the 439 (less 45) car parks is indefeasible. It was argued that MPPJ has not taken any action against D2 vis a vis the DO. Also it was argued that the Ketua Pengarah, Pentadbir Tanah dan Galian should have been added as a party if the plaintiff was seeking to impugn D1's ownership of the 394 car parks as accessory parcels. It is quite clear that MPPJ is not concerned with what happens after the construction has been completed and the building (plus car parks) have been constructed as per the DO.

[112] Clearly, MPPJ (now MBPJ) do not seem to be concerned with how the developer allocates or carves out the 'visitor's car parks'. D1 and D2 have argued very trenchantly that it is up to D2 to decide where the visitor's car parks should be. Ordinarily, D2 may be right. But here events have shown that MPPJ did intervene and D2 was directed to mark out the visitor's car parks. DW3 said that visitor's car park was duly marked out but the markings have worn off and now conveniently takes refuge in the fact that there are more than 1,000 non-accessorised car park parcels which (purportedly) can be used as visitor's car parks. DW3 said that the plaintiff has declined to do so in order not to be embroiled in a dispute with unit owners who are 'occupying' the non-accessorised parcels by virtue of letters that were issued by D2 which allowed the unit owners to use the car parks, albeit that these are non-accessorised parcels and which are strictly speaking 'common property'.

[113] To that extent, it is correct to say that these non-accessorised parcels, although are strictly 'common property', they are factually 'encumbered' due to the issuance of letters by D2 to the unit owners who are using the car parks, albeit that they have not paid any consideration for the car parks. It is unclear as to what impelled or motivated D2 to issue these letters. But these letters were issued and unit owners have been and are occupying these car parks. In fact, PW1 considers the car park that was 'given' to him by D2 to be his property, albeit that it is not shown in his strata title.

[114] There is clearly no evidence that D2 did any marking of visitor's car parks after the meeting with MPPJ on 23 March 2006 and the letter dated 19 April 2006. DW3's mere say so that D2 did do the markings is insufficient. And I am satisfied that PW2 was telling the truth when he said that MPPJ had discussed the location of visitor parking on the perimeter car parks. This is quite reasonable and logical as there is no reason for visitor's car parks to be located in the covered car park area, when such protection from the sun and rain should be for the cars owned by residents and not for visitors whose cars would only be parked there for short period of time. Further there are security issues concerning the location of visitor's car parks in the covered car parks and this is because a security pass is required to activate the boom-gate to enter the covered car parks.

[115] Based on the evidence, I find that it is more probable than not that D2 did not do any markings of visitor's car parks at any location and neither did D2 inform the JMB or the plaintiff of the location of the visitor's car parks at any time. As I said, the location of visitor's car parks is elusive. Since all non-accessorised car parks have been 'encumbered' pursuant to letters issued by D2 to unit owners, it is quite inconceivable that was there any car park at all that was left which remained to be used as visitor's car parks.

[116] The suggestion by D2 that the plaintiff should use the non-accessorised car parks in the plan at p 194, B12 is rather too convenient and is a belated attempt at remedying a situation which was caused or self-induced by D2. Admittedly, all the car parks located in the plan are being used by unit owners and this was due to D2's issuance of letters to these unit owners.

[117] For the plaintiff, it was submitted (on the issue of illegality) that any car park allocated as an 'accessory parcel' to the main parcel (ie the condominium unit) must not be dealt 'independentiy' or 'separately' from the said main parcel and must be 'used' in conjunction with the parcel. The evidence, clearly shows that the whole intention and purpose of purchasing 439 car parks by D1 from D2 was not to use these car parks in conjunction with the 45 units of condominium respectively but to deal with the additional car parks independently and separately by renting it out to different individuals.

[118] In this regard, DW1 had said in Suit 58:

> Q: You agree with me that 13 car parks is very excessive for the purpose of the requirement, the need of this particular unit, 1000 square feet at most 2 bedrooms, but you have here 13 car parks? You agree with me that?
>
> A: Agree that statement. (Emphasis added.)
>
> (at p 383 Bundle 2)
>
> Q: Now Ms Lee, you have 439 unit of car parks right?
>
> A: Minus 45.
>
> Q: Minus 45 units mean what?
>
> A: Of the condominiums.
>
> Q: So the extra car parks are all meant to be rented to different people, am I right?
>
> A: Yes. (Emphasis added.)
>
> (at p419 Bundle 2)
>
> Q: Or rather you give 1 Free car park together this unit that was rented to her? That is what you said just now.

A: Yes.

...

Q: The other 14 car parks you rented it out individually to different people?

A: Agree this statement.

Q: But you don't have a tenancy agreement for this 14 car parks?

A: Agree to this statement.

[119] In my view, as correctly submitted by counsel for the plaintiff, the word 'dealing' or 'dealt' which appears in the sections of the Strata Titles Act 1985 includes the act of 'renting out'. In this regard, it is relevant to note that s 5 of the National Land Code which defines 'dealing' as a transaction under 'Division IV'. 'Division IV' of the National Land Code includes Part 15 which pertains provisions on 'tenancy' under ss 223–224 of the National Land Code. Further, s 205(1) of the National Land Code stipulates that 'dealings' capable of being 'effected' (as opposed to 'registered') under the National Land Code shall be those in Part 14–17 of the Code (which include Part 15 on tenancy); and Part 14 of the National Land Code also deals with 'transfer of exempt tenancies' pursuant to s 220 of the National Land Code.

[120] In this regard, s 5(1) and 5(2) of the Strata Title Act 1985 states that it is read and construed as part of the National Land Code and further, the provisions of the National Land Code shall apply in all respects to parcels held under Strata Titles Act 1965. It was also argued for the plaintiff that s 4 of the Strata Titles Act 1985 utilises the words 'use' or 'intended to be used' which clearly includes the act of 'renting out' or 'tenancy' of an accessory parcel to a third party. According to counsel, this is also consistent with the word 'dealt' or 'dealing' under the National Land Code. In my view, ss 4, 34(2) and 69 of the Strata Titles Act 1985 should be read harmoniously and to the extent that the 394 car parks are rented out by D1 to third parties and are not used in conjunction with the main parcel, they are therefore dealt with separate from the main parcel. I am inclined to the view that these statutory provisions must not be read pedantically or so narrowly as to defeat the intent, purpose and objective of the strict and unambiguous restrictions which are housed in ss 34(2) and 69 of the Strata Titles Act 1985 which prohibits the dealing of the accessory parcel separately or independently of the main parcel.

[121] Thus, I agree with the plaintiff's contention that D1's intention vis a vis the 439 car parks from the outset was to rent all the car parks separately from the parcels to different peoples parties. In this regard, D1's purpose and intent clearly and unmistakably constitutes a breach of the ss 4, 34(2) and 69 of the Strata Titles Act 1985. And in this regard, it is trite that the court will condone an illegality at any stage of proceedings (see *Lee Nyan Hon & Bros Sdn Bhd v*

Metro Charm Sdn Bhd [2009] 6 MLJ 1; [2009] 6 CLJ 626 (CA) at para [70] and *Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay bin Abdullah* [2015] 5 MLJ 619 at pp 637–638 and 651). Thus, I am of the view that the 45 SPAs between D1 and D2 are agreements of such nature that would defeat the law. Hence, they are unlawful and void, but only in so far as the 394 perimeter car parks are concerned.

[122] Accordingly, I am of the view that the renting out of the 439 car parks by D1 is a 'dealing' of the accessory parcels which is independent of the main parcels and this is prohibited by ss 34(2) and 69 of the Strata Titles Act 1985. It was argued that D1 should not have be deprived of its propriety rights over the 394 car parks merely because of 'usage'. The Strata Titles Act 1985 clearly prohibits usage of a certain type. I am of the view that 'dealing' in the National Land Code includes 'tenancy'. It follows that the word 'dealt with' which is used in ss 34(2) and 69 of the Strata Title Act 1985, includes any dealings by way of tenancies or the rental of car parks.

[123] Here the usage of the 394 car parks by D1, is of a type which is prohibited under the Strata Titles Act 1985 as it is being dealt with in a commercial manner and is not appurtenant to the main parcel in that it is not being used in conjunction with the main parcel. It is therefore illegal and the sale of 394 car parks by D2 to D1 falls within s 24(b) of the Contracts Act 1950 and must accordingly be struck down. To that extent I agree with the interpretation of ss 34(2) and 69 of the Strata Titles Act 1985 and the findings made by the learned judicial commissioner in Suit 58.

[124] But I do not agree with the court's others findings that there was non-compliance with the DO by D2, in the sense of failure to allocate one car park per unit owner. In my view, that is a contractual matter between D2 and the unit owner. It is not for MPPJ to dictate contractual terms via the DO. But I agree that D2 did not comply with MPPJ's condition in the DO for there to be visitors parking and as discussed at the meeting on 23 March 2006 that the visitor's car parks was to be located at the perimeter parking. Indeed, per MPPJ's letter dated 19 April 2006, D2 was required to mark out the visitor's car parks. But, there is no evidence that D2 marked out the visitor's car parks. I am not sure why after April 2006, there was no follow up by the JMB or MC with MPPJ about the failure by D2 to mark out the visitor's car park at the perimeter car park. But that is water under the bridge. Even as at today, save for the injunction that was granted by the court, there is no visitor's car park.

[125] The plaintiff says that there was no consideration for the 439 car parks and these were given for free. D1 argues that consideration need not be adequate. It is clear that as between D1 and D2, this was a 'sweetheart deal' and

there is no commercial justification for the massive allocation of car parks by D2 to D1.

[126] DW1 was clear that the purpose was to rent out the car parks ie to commercialise the car parks. I agree that in law there is no restriction in the number of car parks that a developer can sell to a unit owner, but the problem will arise when the usage of the car park becomes commercial. In my view, the Strata Titles Act 1985 plainly prohibits commercial usage of car parks in this manner.

[127] The plaintiff says that D1 and D2 are closely related and that the excessive car parks were just skimmed off to allow D1 to make money by way of rentals to third parties. To my mind, the illegality here lies in the prohibited usage of the 394 car parks. In my view the allocation of 394 car parks by D2 to D1 resulted in an illegality because they were not used nor intended to be used in conjunction with the main parcels. Hence, the intention and usage of the excessive car parks resulted in a breach of ss 34(2) and 69 of the Strata Titles Act 1985.

[128] As such, the excessive car parks which are accessory parcels registered in D1's name becomes null and void and is defeasible under s 340 of the National Land Code. It is important to note that the plaintiff has not sought to impugn the entire 439 car parks that were purportedly sold to D1 as the plaintiff takes the position that D1 should be entitled to keep at least one car park per unit. That is their prerogative as the protagonist of this suit, and if they concede that D1 is entitled to keep 45 car parks, then I see no reason why this court should not accept that position. It was argued for D1 that if the 394 car parks are taken away and given to the plaintiff as 'common property', then the MC may rent the car parks themselves and then they would be no different from D1.

[129] In my view, the difference is that the plaintiff as the MC is entitled to deal with common property in such a way to yield an income if they so choose (which will be for the benefit of all parcel owners). D1 as owners of 45 units stand on a different footing as the income that is derived by D1 will be for their own benefit. Therein lies the difference. As such, for the reasons as alluded to above, I am impelled to the view that the plaintiffs claim vis a vis 394 car parks must be allowed and these car parks are now declared as 'common property'.

[130] At the end of the day, I am satisfied that this was a private law matter which concerned the issue of illegality along the lines as discussed in the preceding parts of this judgment. There is no substance in the argument that the plaintiff should have commenced judicial review against the Pentadbir Tanah dan Galian Wilayah Persekutuan for registering 439 (less 45) car parks

as accessory parcel in D1's name as the illegality here emanated from the evidence which disclosed D1's intention and actual usage of the excessive car parks as a commercial venture i e dealing with the car parks in a manner which is independent of the main-parcels. Of course, it is relevant to ask whether there is illegality if D1 does not use the 45 car parks as well and these are also rented out. The plaintiff has not pressed the point and I shall leave it as an open question for another occasion.

[131] There is also no basis for judicial review against MPPJ (now MBPJ) in respect of alleged non-compliance with the DO (other than for D2's failure to carve out the 218 visitor's car parks) because in terms of the numbers, D1 did construct sufficient numbers of car parks but these were hijacked by D1 who 'gave away' car parks to unit owners and sold excessive car parks to their associated or 'friendly' party, D1.

THE OUTCOME

[132] In the result, the plaintiff's claim is allowed and judgment in favour of the plaintiff is hereby granted on terms as stated in Appendix 'A' (annexed to these grounds of judgment herein). The following costs were ordered:

(a) D1 to pay costs of RM75,000 (subject to 4% allocator) to the plaintiff; and

(b) D2 to pay costs of RM50,000 (subject to 4% allocatur) to the plaintiff.

[133] I also granted a stay on terms as stated in Appendix 'B' (annexed to these grounds of judgment herein).

Order accordingly.

Claim allowed.

Reported by Afiq Mohamad Noor